INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

# CASE CONCERNING THE CONTINENTAL SHELF

(LIBYAN ARAB JAMAHIRIYA/MALTA)

VOLUME III
Replies; Oral Arguments

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COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

# AFFAIRE DU PLATEAU CONTINENTAL

(JAMAHIRIYA ARABE LIBYENNE/MALTE)

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The case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, entered on the Court's General List on 26 July 1982 under number 68, was the subject of Judgments delivered on 21 March 1984 (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984*, p. 3) and 3 June 1985 (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13).

The pleadings and oral arguments in the case are being published in the following order:

Volume I. Special Agreement; Memorials of the Libyan Arab Jamahiriya and Malta.
Volume II. Counter-Memorials of the Libyan Arab Jamahiriya and Malta; Application by Italy for Permission to Intervene, and consequent proceedings.
Volume III. Replies of Tunisia and the Libyan Arab Jamahiriya; commencement of Oral Arguments.
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# REPLY OF THE SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA

# RÉPLIQUE DE LA JAMAHIRIYA ARABE LIBYENNE POPULAIRE ET SOCIALISTE

# INTRODUCTION

1. This Reply is filed pursuant to the request of the Parties for the exchange of written pleadings as contemplated by Article II (2) (c) of the "Special Agreement[1]" signed by the Socialist People's Libyan Arab Jamahiriya (hereinafter referred to as "Libya"[2]) and the Republic of Malta (hereinafter referred to as "Malta") on 23 May 1976 and the Order made by the President of the Court in the present case on 21 March 1984, fixing 12 July 1984 as the time-limit for the filing of a Reply by each Party. In conformity with Article 49(3) of the Rules of Court, this Reply is directed to bringing out the main points in issue between the Parties.

2. It is evident that the Maltese Counter-Memorial has introduced many new elements and lines of argument. This Reply must necessarily address these points. In so doing, however, emphasis will be placed on major points of difference. While the new material submitted by the Parties in their Counter-Memorials would alone have made the exchange of written Replies desirable, the nature and content of the Maltese Counter-Memorial also has made a further exchange necessary. Unfortunately, it introduces so many misunderstandings and misinterpretations, especially of Libya's position and arguments, that clarification is essential. It would be futile and confusing to try to deal with each and every point of this kind to be found in the Maltese Counter-Memorial, but an attempt will be made in this Reply to rectify some of the more serious errors. In an effort to keep the Reply within reasonable proportions, a number of points will not be dealt with here. Libya, however, respectfully reserves the liberty to revert to such points as may be advisable during the oral hearing.

3. In order to illustrate the nature of the "misunderstandings and misinterpretations" mentioned above, one need go no further than Chapter I of the Maltese Counter-Memorial. The very heading to Chapter I is gross distortion. The heading reads, "The Substance of the Libyan Case: Malta Disregarded". Such an imputation is manifestly without foundation. The fact that Libya appears in a case concerning the delimitation of the continental shelf on an equal footing with Malta itself belies and shows

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[1] See para. 4 of the *Libyan Memorial* and fn. 5 at p. 1 thereof.

[2] *Ibid.*, fn. 1 at p. 1.

the absurdity of the imputation. It is difficult to understand how such an assertion could be made in the light of the detailed treatment of the geographical, geomorphological and geological facts concerning Malta contained in the Libyan Memorial and its Annexes. There is no issue as to the existence of Malta and, therefore, no meaning of significance that can be attributed to the final remark in paragraph 25 of Chapter I: "Malta, however, does exist". That remark reflects the sensitivity shown in the Maltese pleadings to the fact that the Maltese Islands are small and their coasts are short in relation to the size of Libya and the length of its relevant coast. It also suggests an awareness of the exaggerated extent of Malta's claim to areas of continental shelf in the Central Mediterranean. The question posed by Malta — "which is the 'disproportionate claim'[1] " — is a good question, and one which Libya seeks to examine in the manner usual in continental shelf delimitation cases[2].

4. The Libyan case is based on the geographical and other physical facts as they are. It is in no way based on some hypothetical delimitation with Italy as if Malta did not exist as suggested in paragraph 4 of the Maltese Counter-Memorial. It is the delimitation of continental shelf areas as between Malta and Libya which is in issue in the present case. This was underlined in the proceedings on Italy's Application for Permission to Intervene in the case and is a basic assumption of the arguments submitted by Libya to the Court. No amount of rhetoric can alter the geographical and geomorphological position of Malta.

5. The difference between the nature of the Libyan and the Maltese approaches to delimitation that emerges with even greater clarity from the Counter-Memorials of the Parties also gives rise to the need for a Reply in this case. An examination of this difference in approach is fundamental to a proper assessment of the strength of the cases presented by the Parties. The approach of Malta is highly abstract: it seems to be designed to divorce the concrete question of delimitation from the reality of the facts with which it is concerned. By contrast, Libya lays emphasis on the facts and circumstances of this particular case and aims at achieving an equitable result in the light of them. This difference in approach will be examined in the Chapters that follow.

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[1] *Maltese Counter-Memorial*, para. 22.

[2] Similar examples of misrepresentation of Libya's case found in Chapter I of the *Maltese Counter-Memorial* appear at paras. 6, 17 and 18, where the phrase, the "indefinite extent of the Libyan claim seawards", appearing at para. 4.21 of the *Libyan Memorial* is taken and twisted out of context; at paras. 8 and 15, where it is suggested that para. 2.37 of the *Libyan Memorial* denies to Malta any south-facing coast at all; and at para. 18 where the *Maltese Counter-Memorial* asserts: "Libya also endeavours to deny Malta not only its physical and cultural independence, but also its position as a State." The misrepresentation in these paragraphs is so evident from a mere reading that any detailed refutation in this Reply would be taking up the Court's time unnecessarily. See also para. 5.04, below.

6. One contention of Malta appears in a novel form in its Counter-Memorial and, as it is a side issue, has been included in a separate chapter, Chapter 2 below. This is the allegation of Libya's "acquiescence" in a median line. With this assertion of Malta, made in different terms in the Maltese Memorial where the words "*status quo*" were repeatedly used, another new element has been introduced into the Maltese Counter-Memorial. In addition, an attempt has apparently been made to show a lack of candor on the part of Libya with respect to information regarding Concession NC 53. Any such insinuation is plainly wrong as will also be shown in Chapter 2 below.

7. As regards the facts, the Maltese Counter-Memorial adds considerably, in terms of pages, to the material previously provided by Malta in its Memorial. This material appears mainly in Annex 2 on "The Scientific Facts", and in Chapter III of the Counter-Memorial. The aim of the Maltese Counter-Memorial is to try to minimise the significance of the major geomorphological and geological features to which the Libyan Memorial drew attention. The truth is that the scientific evidence now produced by Malta only serves to confirm the particularity and importance of the "Rift Zone" and the "Escarpments-Fault Zone" which Malta previously chose to ignore or brush aside. To a large extent, Malta continues to gloss over the salient geographic facts of the case. There are here major differences between the Parties which will have to be dealt with in some detail in this Reply[1].

8. Nevertheless, the main dividing issue is one of law. It stems from Malta's insistence — consistently maintained since the very origin of the dispute — that equidistance and only equidistance can provide the basis for delimitation in the present case. Although Malta's reasoning in support of equidistance has undergone some evolution since its initial proposal in 1972 and even during the course of these written pleadings — as will be noted in later Chapters of this Reply[2] — its basic position founded on the application of equidistance has not changed. Libya, on the other hand, has consistently sought a delimitation which leads to an equitable result having regard to all the relevant facts and circumstances. In the view of Libya, this position is in full accord with the established principles and rules of international law in regard to continental shelf delimitation.

9. It is evident from the written pleadings to date that there are fundamental disagreements between the Parties as to the law. The Maltese Counter-Memorial goes so far as to contend that natural prolongation no longer has any physical content but has become a purely "spatial" concept relating solely to "distance". By blending the separate con-

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[1] See Chapter 5, below.

[2] See Chapters 3 and 4, below.

cepts of entitlement and delimitation, the Maltese Counter-Memorial has attempted to build a case for equidistance as a "primary" method of delimitation[1]. In so doing, the Maltese Counter-Memorial has failed to address the specific facts of this case. It has dealt with the case as one between two "opposite States" — in the abstract — and has avoided any detailed examination of the facts of geography, such as the coasts of the Parties and their relationship to each other and to the continental shelf to be delimited. It has denied the legal relevance of the characteristics of the sea-bed and subsoil of the continental shelf. It has sought refuge in examples of delimitation agreements between other States in different factual settings; and it mistakenly has attempted to extract certain conclusions as to the legal significance of this "State practice".

10. As will be brought out in this Reply, the respective views of the Parties as to the law and the legal relevance of the physical facts of geography, geomorphology and geology are very different. Libya denies that equidistance has any primary role or privileged status and regards itself to be in accord with the jurisprudence of the Court in this respect. The emphasis in Libya's pleadings is on the particular facts of the present case relevant to reaching an equitable result through the application of equitable principles and not on some abstract notion of a method which *per se*, regardless of the particular situation, may be claimed to lead to an equitable result. The final stage in the delimitation process is to test the equity of the result by means of the proportionality criterion. Since the Parties diverge sharply as to the role of proportionality, it has been made the subject of Chapter 7 below.

11. The structure of this Reply may be seen from the Table of Contents. It will be noted that the order of discussion in the previous pleadings has been reversed in the sense that the legal issues that divide the Parties are taken up before the factual issues are discussed. This has been done because — with the exception of certain aspects of the conduct of the Parties including Malta's new allegation of "acquiescence" on the part of Libya — there appears to be a deeper division between the Parties over the law and its application than over the facts themselves[2]. Moreover, the difference in the legal approaches of the Parties to delimitation has influenced, to a large extent, the way in which each Party has dealt with the facts[3].

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[1] See paras. 126-132 of the *Maltese Counter-Memorial* which are discussed in Chapter 3, below.

[2] However, Malta's continued failure to address seriously the geographical facts remains a point of contention between the Parties. See Chapter 5, below.

[3] Of course, it has been necessary to treat the differences over the physical facts which do exist between the Parties in a separate Chapter, particularly since it was only in its *Counter-Memorial* that Malta dealt with the physical aspects of the sea-bed and subsoil in any detail. See Chapter 5, below.

12. Whatever common ground between the Parties both as to the law and as to the facts may exist, it appears from the Counter-Memorials that the gap between the approaches of the Parties to the resolution of the present dispute has, in fact, widened. What follows in this final written pleading of Libya, therefore, is a review of the positions of the Parties in the light of their basic differences as to the legal framework within which the delimitation is to occur, bringing out the other major issues that continue to divide the Parties.

13. It appears useful to begin this summary of differences by considering again the task entrusted to the Court in the request of the Parties in the Special Agreement. This will be the subject of Chapter I which follows next.

# CHAPTER 1

## THE REQUEST MADE TO THE COURT

1.01 The Special Agreement is discussed in Chapter 5 of the Libyan Memorial[1]. Malta treated the Special Agreement in Part I of its Memorial. The interpretation of the Special Agreement in the Maltese Memorial did not prompt any addition in the Libyan Counter-Memorial to what had already been said in the Libyan Memorial. However, the Maltese Counter-Memorial (Part II) stresses a difference of position claimed to exist between the Parties regarding "the task of the Court in the present case" and, hence, it is appropriate to revert to this matter in this Reply to clarify certain points.

1.02 The Libyan Memorial drew attention to certain distinctions between the Special Agreement in this case and the Special Agreement in the *Tunisia/Libya* case, and pointed out that the request in the present case is more analogous to that presented in the *North Sea* cases than to that in the *Tunisia/Libya* case[2]. These distinctions include the absence in the present Special Agreement of any reference to delimitation by "the experts of the two countries" and the inclusion of the provision for "negotiations" to be undertaken between the Parties themselves for concluding an agreement following the Judgment of the Court. The Maltese Memorial, on the other hand, did not focus on textual differences and appeared to find little difference between the Special Agreement in the present case and that in the *Tunisia/Libya* case. The Maltese Counter-Memorial failed to comment on the observations made in paragraphs 5.05 and 5.06 of the Libyan Memorial regarding the text of the Special Agreement.

1.03 Even though the Court has not been requested by the Parties to draw the delimitation line[3], as is evident from the Special Agreement, it has been invested with the task of deciding what principles and rules of international law are applicable to the delimitation between the Parties and how in practice such principles and rules can be applied by the two Parties in order that they may, in their subsequent negotiations, delimit without difficulty their respective continental shelves. A major component of the second task of the Court will be, in the view of Libya, to identify, to weigh and to balance up the relevant factors and circumstances present in this case and to test the equitableness of the anticipated result by the criterion of proportionality[1]. The Court has not, however, been requested to apply any pre-ordained method of delimitation but rather to indicate how in practice the Parties can apply the principle and rules "in this particular case", a point sufficiently developed in paragraph 5.07 of the Libyan Memorial as not to require restatement here.

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[1] Counsel for Libya also dealt with this subject at the oral hearings in connection with Italy's Application for Permission to Intervene in the present case (CR 84/4, 27 Jan. 1984, pp. 29-38).

[2] *Libyan Memorial*, para. 5.06.

[3] In the 1977 *Anglo-French Arbitration* and in the case between Canada and the United States currently before a Chamber of the Court involving a unitary line delimiting both the continental shelf and the fisheries zones of these States in the Gulf of Maine area, the requests of the parties were quite different, since the Court of Arbitration, and the Chamber in the latter case, were asked to draw the actual line of delimitation.

1.04 Malta claims to have perceived in Libya's final Submission an important difference between the Parties as to the task of the Court. In the Maltese Counter-Memorial it is contended that this Submission does not show "how in practice such principles and rules can be applied by the two Parties in this particular case in order that they may *without difficulty* delimit such area[s] by an agreement as provided in Article III[2]." But Libya's position as stated in Libya's final Submission has been misconceived. Contrary to the assertion made a number of times in the Maltese Counter-Memorial[3], Libya has not advanced the Rift Zone as providing a "natural frontier", but rather as a physical factor that constitutes a fundamental discontinuity in the sea-bed and subsoil separating the shelf areas between the Parties[4]. This feature, combined with the relevant geographical circumstances of the present case and viewed in the light of the relevant conduct of the Parties, leads to the conclusion, in Libya's view, that an equitable result which meets the test of proportionality would be achieved by a delimitation line within and following the general direction of the Rift Zone[5]. The facts set forth by Libya in its written pleadings of a geographical, geomorphological and geological character point to the elements which, when balanced together, indicate how in practice an equitable result may be achieved in the present case. These elements are discussed in Chapters 6 and 7 below.

1.05 Malta's position regarding the task of the Court, and the difficulties it sees in this connection with Libya's Submissions, appear to be tantamount to saying that, unless the Court is requested to draw the precise delimitation line — as was the case in the *Anglo-French Arbitration* and the *Gulf of Maine* case — or unless the Court is to conceive its role as prescribing for the Parties a single method of delimitation having the degree of precision of, for example, the equidistance method, the Special Agreement cannot be carried out by the Parties in their negotiations following the Judgment of the Court. Libya dissents from such a view, for it would leave to the Court virtually no choice at all other than to sanction the application of a pre-ordained method, such as Malta's application of equidistance. Libya, on the other hand, believes that it has put forward sufficient factual elements on the basis of which the Court will be able to frame the kind of Judgment enabling the Parties to negotiate the final delimitation line "without difficulty".

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[1] This point is more fully developed in relation to the particular facts of this case in paras. 7.14-7.16, below.

[2] Italics added by Malta in para. 74 of the *Maltese Counter-Memorial*.

[3] See, *e.g.*, *Maltese Counter-Memorial*, para. 332.

[4] See paras. 5.19-5.29, below. See also *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 64, para. 80.

[5] See Chapter 6, below.

1.06 In the light of the proceedings involving Italy's Application for Permission to Intervene and the resulting Judgment of the Court[1], there remains, however, another aspect of the request made to the Court under the Special Agreement that deserves comment at this stage. In that Judgment the Court made it clear that "the rights claimed by Italy would be safeguarded by Article 59 of the Statute [of the Court][2]". In referring to the Judgment to be rendered in the present case, the Court also observed that the "future judgment will not merely be limited in its effects by Article 59 of the Statute: it will be expressed, upon its face, to be without prejudice to the rights and titles of third States[3]". Hence, it is the view of Libya that the task entrusted to the Court can lead to a Judgment which, although perhaps "more limited in scope between the Parties themselves, and subject to more caveats and reservations in favour of third States, than it might otherwise have been had Italy been present[4]", nevertheless should extend to all the areas of continental shelf relevant to a delimitation between Libya and Malta. In determining these areas, it is Libya's view that it must be based on the relevant coasts of the Parties and their relationship to the shelf areas lying off those coasts in the present case, even if such areas may in part extend into areas over which third States may present claims.

1.07 Thus, Libya believes that the Court may properly indicate the principles and rules of international law and how in practice they can be applied by the Parties throughout the entire relevant area[5]. Nevertheless, a distinction may have to be made between that part of the area in which there are no claims by third States, and that part or parts in which there are such claims. In the former part, precisely because there are no such claims, the Parties can proceed to a definitive delimitation. In the latter part, the "caveats and reservations" of the Court will protect the rights of third States by precluding such a delimitation being definitive vis-à-vis such third States. Moreover, it will undoubtedly assist third States if, in such parts of the area, Libya and Malta proceed to a non-prejudicial delimitation between themselves—that is, a delimitation which does not prejudge the rights of third States[1]. For third States will then know against which of the two present Parties, Libya or Malta, they should present their claims if, subsequently, such third States decide they do have claims in this part of the relevant area. Indeed, without a delimitation which extends throughout the relevant area, the solution would remain problematical, for in principle such a restricted solution would compel tripartite negotiations, or possibly adjudications, with all the attendant difficulties for those parts of the relevant area in which third States may have claims.

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[1] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984*, p. 3.

[2] *Ibid.*, p. 26, para. 42.

[3] *Ibid.*, pp. 26-27, para. 43.

[4] *Ibid.*, p. 27, para. 43.

[5] See *Libyan Memorial*, paras. 10.12-10.18, in which the relevant area in the present case is described.

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[1] As expressed by the Court in its 1982 Judgment, "... the rights of other States bordering on the Pelagian Sea which may be claimed in the northern and north-eastern parts of that area must not be prejudged by the decision in the present case." *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 62, para. 75.

## CHAPTER 2

## THE CONDUCT OF THE PARTIES AND THE ALLEGATION OF LIBYAN "ACQUIESCENCE" IN THE MALTESE MEDIAN LINE

2.01 Before turning to the manner in which the Parties differ over the application of the principles and rules of international law governing delimitation in this case, it is necessary to deal with a new theme that has emerged from the Maltese Counter-Memorial. This is the allegation of Libyan "acquiescence" in Malta's median line proposal. As this Chapter will show, there is simply no factual basis for such an allegation.

2.02 The Court will have perceived that, in advancing its acquiescence contention, Malta's arguments directed at the conduct of the Parties have changed. Whereas the Maltese Memorial asserted that delimitation by means of equidistance represented the "*status quo*" between the Parties, the Maltese Counter-Memorial attempts to show Libyan acquiescence in Malta's equidistance line during the period from 1965 to 1973[1]. The Maltese argument now treats this "acquiescence" as an additional foundation for its claim that equidistance produces an equitable result. Since Libya dealt with the invalidity of the earlier "*status quo*" argument in its Counter-Memorial[2], there is no need here to repeat those observations. In the light of the pertinent conduct of the Parties, however, Malta's new contentions alleging Libyan acquiescence in Malta's median line are equally ill-founded.

2.03 One answer to Malta's claim of acquiescence is that there was at that time no legal position put forward by Malta vis-à-vis Libya in which Libya could acquiesce. This is evident from the nature of the acts on which Malta bases its argument: the 1965 Maltese Note Verbale, the 1966 Continental Shelf Act and the grant of Libyan concessions in 1974. A second answer is that the conduct of the Parties, and in particular Malta's own conduct at the time of the enactment of its continental shelf legislation, attests to the fact that as early as 1966 Malta recognised the existence of an area of deep water lying between Malta and Libya corresponding generally to the area of the Rift Zone and acknowledged the significance of this fact for the limit of its continental shelf rights to the south at that time. These aspects will be discussed in turn below.

2.04 Malta seems to have found some new importance in its Note Verbale of 5 May 1965, for the Maltese Counter-Memorial places considerable emphasis on it despite the fact that its existence was not mentioned in the Maltese Memorial[1]. It was Libya which annexed a copy of this Note to the Libyan Memorial, thus bringing it to light in these proceedings[2].

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[1] *Maltese Counter-Memorial*, para. 194.

[2] *Libyan Counter-Memorial*, Chapter 1.

2.05 The upshot of the Note is apparent from its text, which indicated that it was Malta's intention to accede to the 1958 Convention on the Continental Shelf and that Malta had been guided by Article 6(1) of that Convention in determining the boundary of its continental shelf. How Malta can find Libyan acquiescence in a median line delimitation from a Note which stated that Malta had been guided by the 1958 Convention which called, above all, for agreement on delimitation has yet to be explained by Malta[3].

2.06 On 19 May 1966, Malta acceded to the 1958 Convention without any reservations. Shortly thereafter, Malta's 1966 Continental Shelf Act was enacted. This is the principal item of legislation on which Malta relies. As such, it reveals Malta's real attitude toward delimitation at that time. The unilateral nature of this Act and the fact that it could not, of itself, establish a delimitation with other States has already been mentioned in the Libyan Counter-Memorial[4]. In relation to Malta's new acquiescence claims, however, the 1966 Act merits close attention. For, as the facts set forth below show, this Act did not "assert" a claim to the median line vis-à-vis Libya as the Maltese pleadings have suggested.

2.07 It will be recalled that Section 2 of the 1966 Act provided for the definition of Malta's continental shelf as follows:

> " 'The continental shelf' means the sea bed and subsoil of the submarine areas adjacent to the coast of Malta but outside territorial waters, to a depth of two hundred metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas...".

These provisions were by and large faithful to the text of Article 1 of the 1958 Convention to which Malta had just acceded. The remainder of Section 2 of the 1966 Act, however, reads:

> "[S]o however that where in relation to states of which the coast is opposite that of Malta it is necessary to determine the boundaries of the respective continental shelves, the boundary of the continental shelf shall be that determined by agreement between Malta and

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[1] See *Maltese Counter-Memorial*, paras. 183-186.

[2] See *Libyan Memorial*, Annex 34.

[3] The fact that the 1965 Note, incorrectly quoted in para. 183 of the *Maltese Counter-Memorial*, failed to reflect accurately the provisions of Article 6(1) of the 1958 Convention was of little relevance to Libya at the time and called for no comment. In any event, Libya was not a party to that Convention.

[4] *Libyan Counter-Memorial*, para. 1.05. A copy of the 1966 Act may be found in Annex 15 to the *Libyan Memorial*.

> such other state or states or, in the absence of agreement, the median line, namely a line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial waters of Malta and of such other state or states is measured."

As the Libyan Memorial pointed out[1], this second half of Section 2 of the 1966 Act did not accurately reflect Article 6 of the 1958 Convention.

2.08 The ambit of the 1966 Act and its application to the specific situation around Malta were clarified during the debates which took place within the Maltese Parliament over its scope. During the second reading of the Act, Dr. Caruana Demajo, the Maltese Minister of Justice and Parliamentary Affairs, explained the operation of the bill in this manner. He stated that —

> "... it is naturally desirable that an agreement should be reached between the states concerned regarding the limits of the Continental Shelf and the Convention relating to the Continental Shelf to which I have already made reference [the 1958 Convention], already provides for such an eventuality[2]."

As regards the limits of Malta's continental shelf, he went on to state:

> "I would like to make it clear that in so far as Africa is concerned, this matter is not relevant today since the Maltese Continental Shelf and the African Continental Shelf do not meet, and the seas between them are so deep as to prevent exploitation[2]."

Dr. Caruana Demajo then drew a clear distinction between this situation and the one between Malta and Sicily. In the latter case, he noted that the "situation vis-à-vis Sicily is different[2]", and that exploration could be carried out. The Minister stated that is was thus desirable for agreement on delimitation to be reached with Italy. He went on to point out that Italy had already been informed that if agreement were not reached, Malta would consider the median line between itself and Italy as constituting the dividing line[2]. Seen in this context, these discussions reveal the following.

2.09 *First*, the Maltese Minister expressly acknowledged that the limit of the continental shelf was to be determined by agreement where two States laid claim to it. In the light of Malta's acquiescence claims, this affirmation is significant in itself[3].

2.10 *Second*, he observed that the extent of Malta's continental shelf was determined by reference to what was known as the "exploitability criterion". This, of course, reflected the provisions of Article 1 of the 1958 Convention whereby the continental shelf of a coastal State extended beyond its territorial sea to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admitted the exploitation of the natural resources. According to Dr. Caruana Demajo, however, the sea-bed areas lying between Malta and Libya were too deep to be able to be exploited. As a bathymetric map of this area shows, they reach depths well in excess of 200 metres, particularly in the area where the Rift Zone is located. The conclusion to be drawn from the text of the 1966 Act and from the Minister's remarks is that the sea-bed areas lying in this deeper zone fell beyond the limit of Malta's continental shelf as it was defined in the 1966 Act. That being the case, the implication is that Malta, at the time it enacted its 1966 legislation, did not contemplate claiming continental shelf rights in this deeper area and, thus, did not contemplate any continental shelf delimitation with Libya. As a result, it is difficult to understand how Libya could be said to have "acquiesced" in any particular delimitation when no delimitation with Libya was foreseen by Malta at the time and no claim was advanced.

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[1] *Libyan Memorial*, para. 4.06.

[2] Extracts from the Maltese Parliamentary debates, 20-22 July 1966, are attached as *Annex 1*, hereto; see p. 3, thereof.

[3] See *Libyan Counter-Memorial*, paras. 1.05-1.06.

2.11 *Third*, Malta evidently viewed the situation between Italy and itself in quite a different manner. In contrast to the situation between Malta and Libya, the sea-bed north of Malta between the Maltese Islands and Sicily is relatively shallow (generally less than 200 metres) and thus could be said to fall within the definition of Malta's continental shelf as contained in the 1966 Act. This much was confirmed by Dr. Caruana Demajo in his remarks to the Maltese Parliament when he noted the desirability of reaching a delimitation agreement with Italy. To that end, Malta had already sent to Italy a specific proposal for the continental shelf boundary between them[1]. Malta refrained, however, from sending a comparable proposal to Libya. This is further evidence of the fact that Malta did not believe it had a boundary to delimit with Libya because of the water depths involved.

2.12 These aspects of the 1966 Act shed light on Malta's subsequent conduct as well. For example, the very first offshore concessions granted by Malta — those offered for bidding in 1970 and issued in 1971 — confirmed the limited scope of the 1966 Act. As the Libyan Memorial pointed out[2], these concessions were grouped closely to the north and east of Malta. *Map 2* illustrates these concessions and shows how their lateral limits coincided almost precisely with the 200 metre isobath[3], and their northern limits ran approximately along a median line between Malta and Sicily[1]. No concessions were granted during this period to the south of Malta where the deeper areas were not considered exploitable. This practice was consistent with the provisions of the 1966 Act as interpreted by the Government of Malta since the exploitability criterion defined the outer limit of Malta's continental shelf.

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[1] Malta informed Italy of this proposal by a Note dated 31 December 1965. A copy of this Note was attached as Annex 2 to Malta's Observations on the Italian Application for Permission to Intervene and may be found as *Annex 2*, hereto.

[2] See *Libyan Memorial*, paras. 4.29 and 9.32.

[3] See also *ibid*., Map 13, facing p. 146.

2.13 These facts expose the lack of any substance in Malta's assertion that Libya acquiesced in a median line south of Malta in the period from 1965 to 1973. Malta itself did not contemplate a delimitation vis-à-vis Libya and other North African States at the time of its 1966 legislation. Indeed, Malta appears to have become actively interested in reaching an agreement with Libya only after the 1971 Italy-Tunisia Agreement focussed Malta's attention on the area to the south. The first time Malta unveiled its median line proposal to Libya was at the meeting at the Auberge de Castille in July 1972[2]. At no time during the discussions that followed did Malta raise the claim either of Libyan acquiescence in a particular line of delimitation or of the existence of a "*status quo*". What is significant is that Malta's Prime Minister referred to Malta's proposed median line as "provisional" in a Note dated 23 April 1973 addressed to Colonel Ghadaffi[3]. Such a characterisation of Malta's position hardly supports the arguments now advanced alleging Libyan acquiescence.

2.14 The final elements in the Maltese Counter-Memorial on which the contention of Libyan acceptance of the median line is based are the Libyan petroleum concessions granted in 1974 and, in particular, Concession NC 53 granted to TOTAL. There it is asserted that Concession NC 53 "reflects a measure of Libyan acceptance of the median line[4]". Regrettably, this assertion is tainted by an insinuation that Libya has misled the Court as to the extent of this concession. This is not so. As the facts that are recounted below attest, the grant of Concession NC 53 in no way constituted an acceptance of Malta's median line. Nor has this concession been falsified in any way in Libya's pleadings as the remarks in the Maltese Counter-Memorial would suggest.

2.15 Concession NC 53 had its origins in discussions that were held between representatives of Libya and the Compagnie Française des Pétroles ("C.F.P." — the parent company of TOTAL). These discussions led up to minutes of understanding being signed in Paris on 20 February 1974. Based on these minutes, the Libyan National Oil Corporation (the "N.O.C.") and

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[1] As noted in para. 2.11, above, the fact that delimitation with Italy was contemplated was reflected in the Parliamentary debates over the provisions of the 1966 Act.

[2] See *Libyan Memorial*, para. 4.30.

[3] *Ibid.*, Annex 41.

[4] *Maltese Counter-Memorial*, para. 189 (d). As noted in the *Libyan Memorial*, para. 4.44, Libyan "concessions" were granted at this time in the form of Exploration and Production Sharing Agreements ("EPSAs").

C.F.P. signed Heads of Agreement for an Exploration and Production Sharing Agreement ("EPSA") on 14 April 1974. Subsequently, the EPSA itself was signed on 13 October 1974[1]. This agreement encompassed four separate areas, of which one — Area A — constituted NC 53.

2.16 Appendix I-A of the Agreement defined Area A in the following terms:

> "a) On the one hand, the seaward limit of jurisdiction of the Libyan Arab Republic over the seabed and subsoil underlying the Mediterranean Sea as established by or pursuant to any agreement between the Libyan Arab Republic and any other relevant Mediterranean State claiming jurisdiction over such seabed and subsoil, between the westernmost and the eastern intersections of the said limit with the broken line defined in (b) below.
>
> b) On the other hand, that part of the continuous broken line defined hereafter which is comprised between the easternmost and westernmost intersections referred to in (a) above."

The "continuous broken line" referred to in (b) above was specified by coordinates and corresponds to the southern boundary of NC 53 as it is depicted on Map 11 in the Libyan Memorial. As for the northern and western limits of NC ⑦ 53, these were clearly indicated on the official Libyan map which was attached to the legislation authorising the grant.

2.17 By Act No. 58 of 23 September 1974[2], N.O.C. was duly empowered to execute the contract by the Revolutionary Command Council. As usual, Act No. 58 was published in the Libyan Gazette together with the map mentioned above indicating the limits of the pertinent Libyan concessions. A copy of the Act together with this map appears in *Annex 3*. As the map reveals, the limits of Concession NC 53 therein depicted are the same as those that were shown on Map 11 in the Libyan Memorial. A subsequent map published by N.O.C. in 1975 shows the identical configuration for this concession[3].

2.18 At the time Concession NC 53 became effective, therefore, the area it encompassed was not in issue. Article 13 (a) of the Heads of Agreement stipulated that the grant would "not exceed 22,000 square kilometres" — an area which corresponds to the size of NC 53 as it appears on Map 11 in the Libyan Memorial. Moreover, Appendix I-A of the EPSA itself set forth the grid system along which the individual blocks within the concession were to be subdivided[1]. Under the provisions of this Appendix, these blocks extended as far north as 35° 50′ N latitude (toward which NC 53 may be seen to extend on Map 11), as far south as 33° 50′ N latitude (corresponding to the actual southernmost limit of the concession on Map 11), and as far east as 14° 45′ E longitude (the easternmost limit as again depicted on the map). The western boundary of NC 53 was simply extended along the same bearing as the western limits of Libyan Concessions 137 and NC 41.

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[1] A copy of the relevant portions of the Heads of Agreement and the EPSA is attached in *Annex 3*, hereto. In accordance with Article 50(2) of the Rules of Court, a copy of the entire EPSA has been furnished to the Registry.

[2] This legislation became effective upon its publication on 17 December 1974. The Libyan Ministry of Petroleum notified representatives of TOTAL by a letter dated 17 November 1974 that NC 53 had been ratified by this legislation. TOTAL responded by a letter dated 12 January 1975 in which it acknowledged 17 December 1974 as the "Effective Date" of the contract. Copies of these letters are attached at *Annex 3*, hereto.

[3] A reduced copy of this map appears at *Annex 3*, hereto. A full scale copy of this map has been deposited with the Registry.

2.19 In this manner the insinuations of the Maltese Counter-Memorial may be laid to rest. What is clear is that Malta's assertion to have found a measure of Libyan acquiescence in Malta's median line by virtue of the grant of Concession NC 53 has no substance at all. Nowhere in the relevant documents is there any mention of such a line. The facts speak otherwise. Indeed, Malta itself sent a Note to TOTAL on 17 June 1975 indicating that Malta had been informed that TOTAL was carrying out oil exploration activities in the offshore area in the Mediterranean north of Malta's median line[2]. It is difficult, therefore, to see how the "Median Line" could now be said to have been "accepted" by virtue of NC 53. In addition, the Maltese Counter-Memorial has chosen to ignore completely the implications of the Libyan grant of Concessions NC 35A and 35B, as well as Libya's protests over Maltese concessions south of Malta and Libya's reaction to the breach of the no-drilling agreement at the time of the Texaco-Saipem incident[3].

2.20 Malta's contention that Libya has acquiesced in a median line delimitation is, thus, wrong. To the contrary, Malta — at the time of the enactment of its 1966 Continental Shelf Act — implicitly recognised the significance of the area comprising the Rift Zone inasmuch as it did not contemplate a delimitation with Libya due to the depth of the sea-bed in that area. Thus, while Malta has exhibited a certain obstinacy in its claim to a median line delimitation since discussions between the Parties began, Malta never advanced such a claim vis-à-vis Libya prior to July of 1972. As Malta itself acknowledged in paragraph 62 of its Memorial, discussions with Libya did not begin until 1972, making it difficult to see how Libya could have acquiesced in anything before that time. The claim to a median line, when it eventually was proposed by Malta at the meeting at the Auberge de Castille, was not in any way accepted or acquiesced in by Libya but, being the first time Libya had been informed of a concrete Maltese position, was taken away for study. Libya's flat rejection of the median line came less than a year later, as the Libyan pleadings have already explained[1].

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[1] A copy of this document is attached at *Annex 3*, hereto.

[2] A copy of this Note was attached as Annex 56 to the *Libyan Memorial*. It should also be noted that the Maltese Notice L.N. 41 of 1973 itself acknowledged that Malta's own concessions were subject to alteration in the event of a different agreement on the shelf boundary between Libya and Malta. See *Libyan Memorial*, Annex 42, p. B 234.

[3] See *Libyan Memorial*, paras. 4.49-4.53 and paras. 4.79-4.81, and *Libyan Counter-Memorial*, paras. 1.14-1.27.

2.21 It may be said, therefore, that both Libya and Malta recognised the existence of a difference in their views regarding delimitation soon after discussions between them had commenced. This recognition led in turn to the drafting of the Special Agreement and to the no-drilling understanding between them pending the resolution of the dispute. Malta continues to omit any reference to the existence of the no-drilling understanding despite the fact that it constitutes an important element of mutual conduct that is relevant to the delimitation question[2]. By itself, the no-drilling understanding contradicts the notion of either Libyan acquiescence in the median line or the existence of any "*status quo*". As noted in the Libyan Memorial and Counter-Memorial, however, this understanding and history shed light on the area in dispute between the Parties[3].

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[1] *Libyan Memorial*, para. 4.33, and *Libyan Counter-Memorial*, para. 1.12.

[2] The existence of an agreement between Malta and its concession holders to suspend exploration activities pending the resolution of the dispute was explained by Prime Minister Mintoff before the Maltese Parliament on 16 Jan. 1978. Extracts from the Prime Minister's address are attached in *Annex 4*, hereto.

[3] *Libyan Memorial*, para. 9.26, and *Libyan Counter-Memorial*, paras. 1.23-1.27.

# CHAPTER 3

## ISSUES REGARDING THE PRINCIPLES AND RULES OF INTERNATIONAL LAW GOVERNING CONTINENTAL SHELF DELIMITATION

3.01 Apart from the obvious difference that exists between the Parties as to whether any one method of delimitation commands a privileged status[1], three other basic differences over the way in which the Parties interpret and apply the principles and rules of continental shelf delimitation to the present case may be identified. Stated briefly, these differences relate to (i) the meaning and content each Party ascribes to the process of applying equitable principles; (ii) the role of relevant circumstances in the delimitation process; and (iii) the legal relevance attached to particular factors and circumstances[2].

3.02 These differences go to the very heart of continental shelf delimitation. Their resolution has consequences not only for the delimitation in the present case, but also for future delimitations in other parts of the world[3]. In view of the importance which attaches to these issues, each will be addressed separately in the Sections that follow.

### A. The Process of Applying Equitable Principles

3.03 The Maltese Counter-Memorial has unveiled an approach to delimitation — only hinted at in the Maltese Memorial — which does violence to the primary role of equitable principles in delimitation. This approach results from the intermingling and confusion of two quite distinct concepts — entitlement and delimitation. Such intermingling and confusion had been introduced in the Maltese Memorial; if anything, it has been accentuated in Malta's Counter-Memorial[4]. The end result is that the proper criteria relevant to delimitation, which center around the principle that the delimitation is to be effected in accordance with equitable principles taking into account all the relevant circumstances in order to reach an equitable result, have been ignored by Malta in favour of contentions relating to the outer limits of a State's continental shelf rights in situations where no delimitation issue exists. A close look at certain portions of the Maltese Counter-Memorial reveals the fallacies in this approach, for it is an approach which subordinates the role of equitable principles to a single method of delimitation — the equidistance method — and which gives a primary status to that method.

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[1] This difference is discussed in Chapter 4, below. See also Chapter 7 of the *Libyan Memorial* and Chapter 5 of the *Libyan Counter-Memorial*.

[2] The issue of proportionality, over which the Parties also differ, will be taken up separately in Chapter 7, below.

[3] See, in this regard, Chapter 8, below. As pointed out in the *Libyan Counter-Memorial*, para. 5.97, over 300 maritime delimitation situations exist, the vast majority of which have not, as yet, been agreed.

[4] Both the *Libyan Memorial*, paras. 6.01-6.09, and the *Libyan Counter-Memorial*, paras. 4.10-4.16, drew attention to the fundamental distinction to be drawn between entitlement to areas of continental shelf and the delimitation of those areas in a concrete case.

3.04 Malta's legal exposition of the rules of international law which it considers as "governing the delimitation process" is set forth in paragraphs 152 to 176 of the Maltese Counter-Memorial. The starting point of the delimitation process, according to Malta, is to be found in the "legal basis of title to continental shelf rights[1]". It is asserted by Malta that on this point the two Parties are in agreement and that where they diverge "is on the content of this legal basis of title[1]" itself. Although the Maltese Counter-Memorial acknowledges that physical considerations lie at the origin of the continental shelf concept, it asserts that the "meaning and content of the concept of prolongation has evolved[2]". This is followed by the sweeping, unsupported assertion that prolongation is no longer defined by reference to physical factors "but by reference to a certain distance from the coasts[2]". From this, Malta proceeds to contend that "the basic concept of distance between the coasts forms the necessary point of departure of the whole process[3]". And in paragraph 156 of the Maltese Counter-Memorial this line of argument is brought to its ultimate conclusion when it is stated that "Malta expressly requests the Court to recognize this principle [the so-called "distance principle"] as the controlling element in the delimitation in the present case".

3.05 This is an extraordinary request, and differs sharply from the fundamental rules of continental shelf delimitation as these rules have been expressed by the Court and as they would be applied under Article 83 of the 1982 Convention. "Title" is, of course, relevant to delimitation in the sense that if there is no claim of title there can be no dispute about delimitation. But it does not follow that the "basis of title" means the "basis of delimitation". This is clear both in principle and from paragraph 10 of Article 76 of the 1982 Convention: in principle, because a question of delimitation only arises where there is a clash of claims to title; and from paragraph 10 of Article 76, in the light of the plain meaning of its text:

> "The provisions of this article [Article 76] are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts."

3.06 The Maltese Counter-Memorial attempts to support the contention that distance is now "the controlling element" in continental shelf delimitation by citing paragraph 48 of the 1982 Judgment[1]. The portion of this paragraph cited by Malta reads as follows:

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[1] *Maltese Counter-Memorial*, para. 153.

[2] *Ibid.*, para. 122.

[3] *Ibid.*, para. 155.

> "It is only the legal basis of the title to continental shelf rights—the mere distance from the coast—which can be taken into account as possibly having consequences for the claims of the Parties."

It will be apparent that this quotation is taken out of context and in a manner which distorts its meaning[2]. The entire paragraph 48 of the Court's Judgment is set out below with the portion quoted in the Maltese Counter-Memorial italicised:

> "48. The principle that the natural prolongation of the coastal State is a basis of its legal title to continental shelf rights does not in the present case, as explained above, necessarily provide criteria applicable to the delimitation of the areas appertaining to adjacent States. In so far as Article 76, paragraph 1, of the draft convention repeats this principle, it introduces no new element and does not therefore call for further consideration. In so far however as the paragraph provides that in certain circumstances the distance from the baseline, measured on the surface of the sea, is the basis for the title of the coastal State, it departs from the principle that natural prolongation is the sole basis of the title. The question therefore arises whether the concept of the continental shelf as contained in the second part of the definition is relevant to the decision of the present case. *It is only the legal basis of the title to continental shelf rights — the mere distance from the coast — which can be taken into account as possibly having consequences for the claims of the Parties.* Both Parties rely on the principle of natural prolongation: they have not advanced any argument based on the "trend" towards the distance principle. The definition in Article 76, paragraph 1, therefore affords no criterion for delimitation in the present case."

It is quite evident that in the passage quoted by Malta the Court was only dealing with the new element contained in paragraph 1 of Article 76 of the 1982 Convention, in which distance from the baselines in certain circumstances — which do not exist in the present case — may become the basis for the title of the coastal State. The Court was not making a general statement about the existing law governing the basis of title, still less about delimitation.

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[1] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 48, para. 48.

[2] *Maltese Counter-Memorial*, para. 155.

3.07 This is made clear by the previous paragraph (paragraph 47) of the 1982 Judgment, where the Court discussed briefly Article 76 of the 1982 Convention. The Court, after mentioning paragraph 10 of Article 76, analysed the definition of the continental shelf found in paragraph 1 of Article 76 in the following terms:

> "That definition consists of two parts, employing different criteria. According to the first part of paragraph 1 the natural prolongation of the land territory is the *main* criterion. In the second part of the paragraph, the distance of 200 nautical miles is in certain circumstances the basis of the title of a coastal State[1]."

What are the circumstances in which distance becomes the basis of title? They are clearly spelled out in paragraph 1 of Article 76: when "the outer edge of the continental margin does not extend up to that distance[2]".

3.08 Aside from what the Court had to say on the subject in its 1982 Judgment, the proceedings of the Third Conference on the Law of the Sea stand as a clear rejection of the Maltese thesis that simple distance has now been recognised as the sole basis of title. Such a thesis is contrary to what the Conference intended. Physical natural prolongation of the land territory is still regarded as the essential, primary basis of title — the "main criterion" in the Court's words —for the coastal State's continental shelf rights. The distance criterion emerged as a purely secondary and subsidiary basis of title in those particular situations where a coastal State's continental margin did not extend as far as 200 nautical miles. For such disadvantaged States it thus extended the outer limit of their shelf entitlement. In addition, the distance criterion served a second purpose of setting an absolute outer limit for all States of 350 nautical miles to assure that adequate areas of sea-bed, ocean floor and subsoil would remain available to all States as the "common heritage of mankind". Thus, the distance criterion was concerned only with outer limits of the continental shelf and not with delimitation of that shelf where there were conflicting claims[3].

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[1] Italics added. It is evident that the Court was referring here to natural prolongation in a physical sense and not as a purely spatial concept, as Malta appears to contend.

[2] The "continental margin" is, of course, a defined term, the definition appearing in para. 3 of Article 76. It is, therefore, rather a surprise to find this same para. 48 of the Court's 1982 Judgment quoted in part again at para. 128 of the *Maltese Counter-Memorial* where language has been included in the quotation "(*i.e.*, up to 200 miles)" which is not to be found in para. 48 at all and which changes the meaning of the words "in certain circumstances". On the basis of the scientific evidence, the entire sea-bed areas of the Pelagian and Ionian Seas fall within the Art. 76 definition of "continental margin". In fact, there seems to be agreement with Malta on this point. Consequently, there is no area at issue in the present case which lies beyond the continental margin and to which the "distance principle" might be said to apply.

[3] Distance may only be said to involve "delimitation" in the sense that it "delimits" the outer limits of the continental shelf from the international area beyond.

3.09 It follows that the whole argument erected in the Maltese Counter-Memorial in order to establish natural prolongation solely as a "spatial" concept is ill-founded[1]. And as the spatial argument vanishes so also does the basis for Malta's assertions that "the delimitation process must in the submission of Malta, necessarily begin by taking into consideration an equidistance line between the two coasts" and that "equidistance is the most appropriate technique to give effect at the same time to the two components of natural prolongation: distance and coasts[2]".

3.10 Malta cites no authority for these propositions regarding equidistance. But the cornerstone of Malta's entire argument as now presented appears to consist of the contention that natural prolongation is a "spatial" concept which, together with a so-called "basic concept of distance between the coasts", forms the "necessary point of departure of the whole process[3]". As noted above, neither Article 76 of the 1982 Convention (particularly in the light of the proceedings of the Third Conference on the Law of the Sea) nor the Court's 1982 Judgment can be relied upon for the proposition that natural prolongation has become a purely "spatial" concept. By failing to preserve the clear distinction between the concept of the continental shelf as defined in paragraph 1 of Article 76 and the process of delimitation provided for under Article 83 — a distinction so clearly pointed to by paragraph 10 of Article 76 — the Maltese position, as it has evolved in its Counter-Memorial, has the effect of evading the fundamental principle of delimitation: that it should be effected in accordance with equitable principles[4].

3.11 In this manner, the Maltese Counter-Memorial sets the stage for a new approach whereby equidistance becomes a "primary delimitation" which is *prima facie* equitable[5]. This proposition is advanced in the teeth of the unmistakable trend away from equidistance as a mandatory method of delimitation as reflected in the jurisprudence, in the 1982 Convention and in State practice[1].

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[1] What, if any, distinction is intended between the terms "spatial concept" and "distance principle" is left unexplained in the *Maltese Counter-Memorial* and it is, therefore, assumed here that they are used by Malta interchangeably.

[2] *Maltese Counter-Memorial*, para. 157.

[3] *Ibid.*, para. 155.

[4] A clear expression of this fundamental principle was provided by Counsel for Malta during the Oral Hearings on Italy's Application for Permission to Intervene (CR 84/6, 30 Jan. 1984, p. 16):

> "The applicable law is now clear as a result both of case law and of the terms of Article 83 of the 1982 Law of the Sea Convention. International law requires in the delimitation process the application of equitable principles to reach an equitable result. The considerations which lead to a particular conclusion in one case do not necessarily lead to the same conclusion in another, even in a neighbouring or possibly overlapping area. Each case must be decided upon its own merits, having regard to all the relevant circumstances."

[5] *Maltese Counter-Memorial*, para. 166.

3.12 Yet even if, *arguendo*, it were granted that entitlement would flow from a "spatial" concept, this would not have the effect of setting aside the prime objective in continental shelf delimitation of achieving an equitable result through the application of equitable principles having regard to the relevant facts and circumstances of the particular case and of substituting therefor the equidistance method as a "primary delimitation", as Malta would urge. Even in such a case, the lengths and the relationships of the coasts of the Parties and the characteristics of the sea-bed and subsoil of the continental shelf, together with the other relevant facts and circumstances, necessarily must weigh in the balance in determining what is an equitable result.

3.13 In contrast to Malta's approach, Libya regards the starting point of the process to be not equidistance but the application of equitable principles taking into account all the relevant facts and circumstances. Hence, the facts of the particular case are the key elements to consider, and it is in the light of these facts that an equitable result that satisfies the test of proportionality must be sought. Malta's approach relies on an abstract construction based on the outer limits of a State's entitlement to continental shelf — a matter not in issue in the present case. Libya's approach rests on the facts of the particular case and how they relate to an equitable delimitation. It is, therefore, to the role of the relevant facts and circumstances of the present case that the next section turns.

### B. The Role of Relevant Circumstances

3.14 In paragraph 107 of the Maltese Counter-Memorial it is said that the concept of the delimitation process developed in the Libyan Memorial is "flawed" in respect of the role which the relevant circumstances are required to play in the process. The Maltese Counter-Memorial then claims to accord relevant circumstances "a leading place in the delimitation process[2] " — a proposition with which Libya is in full accord — but suggests that their "precise role has yet to be defined". Whether any further definition of the precise role of relevant circumstances is necessary is a point of no real significance. The essential point is that the primacy of equitable principles and relevant circumstances is well established in the jurisprudence. Since the application of equitable principles involves the balancing of all the relevant facts and circumstances, their role depends inevitably on the facts and circumstances of each case. Therefore, the abstract approach of the Maltese Counter-Memorial seeking further definition is going in the wrong direction. Yet with this starting point, the Maltese Counter-Memorial embarks on a lengthy effort to define the role of relevant circumstances (paragraphs 109 through 115), an excursion which seems designed to minimise their role in order to pave the way for establishing equidistance as the primary method of delimitation.

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[1] This trend has been discussed at length in Chapter 7 of the *Libyan Memorial* and Chapter 5 of the *Libyan Counter-Memorial*.

[2] *Maltese Counter-Memorial*, para. 108.

3.15 The analysis in the Maltese Counter-Memorial takes the following course: (i) the judge's task is not merely a mechanical one — it involves a balancing of the various relevant considerations rather than applying some predetermined solution drawn from the relevant circumstances (paragraph 109); (ii) the judge must follow a course between the application of too general or abstract a rule, on the one hand, and an "excessive individualisation of the rule of law", on the other; there must be a minimum of generality to avoid the process becoming an "exercise of discretion or conciliation" or an "operation of distributive justice" (paragraphs 110 and 111, citing paragraph 71 of the 1982 Judgment); (iii) hence, the taking into consideration of relevant circumstances "never occurs on its own in the delimitation process" with the result that "relevant circumstances never suffice by themselves to establish the boundary line" since the legal nature of entitlement has a decisive role in the delimitation process[1], nor do they ever support a boundary line but rather they enable the judge to achieve an "equitable and reasonable solution" (paragraphs 112, 113 and 114); (iv) therefore, "relevant circumstances do not provide the original basis for delimitation, but rather have the status of criteria for evaluating the equitableness of a delimitation *prima facie* indicated by the geographic facts" (paragraph 114).

3.16 This flow of argument consists of a mixture of uncontested generalities and unsupported contentions. It leads to the proposition that the first step in the delimitation process is to start with the equidistance method — which in Malta's view is the appropriate technique required by the "distance principle" between coasts with an opposite relationship. This analysis leads, in turn, "provisionally, not definitively", to a line produced by equidistance as the *prima facie* method in contradiction with Malta's assertion that the judge's task is not to apply a predetermined solution[2]. The second step in the delimitation process is to use relevant circumstances to "adjust" this equidistance line (the *prima facie* method) if it proves to be inequitable or unreasonable[3].

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[1] This view is contradicted by Article 76, para. 10 of the 1982 Convention.

[2] See para 3.15 (i), above.

[3] To quote Malta exactly in this regard:

> "This first approach, purely provisional and tentative, is followed at a second stage by taking into consideration the relevant circumstances of the case. If this consideration leads to the conclusion that the line emerging from the first stage is inequitable or unreasonable it must be adjusted or even, in certain cases, combined with other methods." *Maltese Counter-Memorial*, para. 117.

3.17 These paragraphs, which might have borne the heading "The Subordinate Role of Relevant Circumstances", reveal several things. *First*, this part of Malta's argument poses considerable difficulties in view of the clear position of primacy accorded by the jurisprudence to the application of equitable principles and, consequently, to the relevant circumstances of the particular case. *Second*, Malta's reasoning attempts to pave the way for its assertion of a primary role for the application of the equidistance method. *Third*, Malta attempts to lay a basis for leap-frogging over *(jouer à saute-mouton)* the important physical features that exist in the relevant areas of the continental shelf in the present case and deflecting attention from the relevant coasts of the Parties. In short, what Malta seeks to do is to assert distance as the basis of title, then to equate the "distance principle" with equidistance, and finally to consider "relevant circumstances" only as subsidiary factors which may call for some minor adjustment of the equidistance line. Predictably, Malta contends that there are no such relevant circumstances in this case and so equidistance stands unmodified and unimpaired. It is a process of reasoning which elevates equidistance from merely one possible method among others to the status of an absolute principle. Anything more alien to the whole development of the law since 1958, and to the outcome of the discussions at the Third Conference on the Law of the Sea, can hardly be imagined.

3.18 It is appropriate now to turn to what the Maltese Counter-Memorial has asserted is "flawed" in the role ascribed by Libya to relevant circumstances[1]. The curious fact is that the alleged "flaws" in the Libyan position are not revealed. Paragraph 113 refers forward to Malta's disagreement with Libya over the legal basis of title, involving Malta's contention that natural prolongation is a "spatial" and not a physical concept. But as to the delimitation process itself, no "flaws" are specifically singled out. To the contrary, paragraph 114 erroneously suggests that Libya is in agreement with Malta in according to relevant circumstances the subordinate role of "*verifying* whether the delimitation suggested by the recourse to the legal basis of title is equitable and reasonable[2]". No reference to this effect is made to any portion of the Libyan Memorial, and no such statement can be found in Libya's pleadings. This is not the view of Libya as to the role of relevant circumstances in the delimitation process.

3.19 The role of relevant circumstances was covered principally in paragraphs 6.32 through 6.43 of the Libyan Memorial in a subchapter headed "Equitable Principles and the Aim of Securing an Equitable Result". The Libyan Counter-Memorial also devoted considerable attention to the role of relevant circumstances in the delimitation process[3]. It is not necessary to restate the points made there in this Reply: they suggest no such subordinate or secondary role for relevant circumstances.

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[1] See *Maltese Counter-Memorial*, para. 107.

[2] Italics added.

[3] *Libyan Counter-Memorial*, Chapter 6, Section A.

3.20 The subordinate role that Malta would ascribe to the relevant circumstances of the case is evidently tied to the normality which Malta asserts characterises the particular geographical, geomorphological and geological setting. As expressed in paragraph 330(a) of the Maltese Counter-Memorial:

> "The key elements are to be derived from the geographical circumstances, which are characterised by an absence of unusual features."

Malta's constant resort to what it regards as the normality of the situation of the present case—a far cry from the actual facts, as the Libyan pleadings, including Chapter 5 below, demonstrate—seems to be a throwback to the "equidistance-special circumstances rule" derived from the 1958 Convention. Malta seems to treat relevant circumstances as if they were special circumstances that have relevance only if they justify departing from equidistance in the event the situation is not "normal". In its 1969 Judgment, the Court disposed of such a resort even to special circumstances when it said that—

> ". . . since once the use of the equidistance method of delimitation is determined not to be obligatory in any event, it ceases to be legally necessary to prove the existence of special circumstances in order to justify not using the method[1]."

In no sense, therefore, are relevant circumstances to be relegated to the role of a mere check on the result produced by equidistance. The appropriateness of equidistance, or any other method, in a particular case is determined on the basis of whether in the light of all the relevant circumstances of that case it leads to an equitable result. In the present case, such a test is clearly not met by the median line proposed by Malta.

### C. The Legal Significance of the Physical Facts and Circumstances

3.21 Libya's Memorial and Counter-Memorial dealt extensively with the relevant physical facts and circumstances both in respect to their legal significance[2] and their factual content[3]. There are, *first*, the physical factors of primary significance such as the coasts of the Parties, the land territory (or landmass) of each and the characteristics of the continental shelf (that is, the sea-bed and subsoil) related to the coasts. *Second*, the broader geographical setting is of importance in the present case: a small island group is located in a confined sea surrounded by larger coastal States and other islands, both large and small, rather than being situated alone in the middle of a large ocean.

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[1] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 46, para. 82.

[2] See, generally, *Libyan Memorial*, Chapter 6, and *Libyan Counter-Memorial*, Chapter 4.

[3] See *Libyan Memorial*, Chapters 2 and 3, and *Libyan Counter-Memorial*, Chapter 2.

3.22 As Chapter 5 below brings out, the Parties differ not so much as to the facts themselves but rather as to their legal significance and the weight to be accorded to them for purposes of the present delimitation. On a superficial plane, the Maltese Counter-Memorial continues to appear to discuss geography as a key aspect of the case. On closer examination, it is evident that the Maltese pleadings avoid or ignore most of the relevant geographic facts. Coastal lengths, configurations, orientations and relationships, which the jurisprudence has established as being of prime relevance, give way to basepoints, which reflect none of these elements of geography. To say, as Malta does[1], that the relationship of the Libyan and Maltese coastlines is "remarkable only in terms of its normality" or that the "primary elements in the geographic facts are uncomplicated" or that "each pertinent coast should be given its appropriate legal significance on the basis of the distance principle and the use of controlling basepoints", is to utter a series of incorrect or, at best, ambiguous phrases devoid of any content regarding the particular geographic facts of the case.

3.23 Libya's views regarding the legal relevance of coastal lengths and configurations, size, the relevant area, and the presence of third States have been amply developed in the Libyan Memorial and Counter-Memorial. Their importance rests on concrete, readily ascertainable facts and not on abstract notions. The Maltese Counter-Memorial has, by and large, elected not to dispute the geographic facts put forth in the Libyan Memorial. What does deserve mention at this stage, however, is the question of the legal relevance of sea-bed and subsoil features to the delimitation of the continental shelf. This is a point which, based on the Counter-Memorials of the Parties, is in serious contention between them[2].

3.24 These features are, according to Malta, legally irrelevant due to the purely "spatial" content which natural prolongation is said to have acquired as a result of Article 76 of the 1982 Convention. The intermingling in the Maltese pleadings of the basis of entitlement with the delimitation process is aimed at making these features irrelevant to delimitation as well. The defects in this line of argument have been dealt with in Section A above. The Maltese Counter-Memorial then proceeds in Part I, where scientific matters are taken up (paragraphs 41-62), to make the following assertion:

> "As Malta presently hopes to show, the natural prolongation argument, as developed by Libya, entirely lacks support in international law. Whether the "Rift Zone" and the "Escarpments-Fault Zone" correspond or not to the description given in the Libyan Memorial, is entirely without legal interest. Quite different criteria

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[1] *Maltese Counter-Memorial*, para. 270.

[2] The more factual aspects of geography and of the sea-bed and subsoil features will be discussed in Chapter 5, below.

> are required by international law to form the basis of the delimitation of the continental shelf between Malta and Libya. It is, therefore, only out of respect for the Court that Malta proposes to review briefly in the present Chapter the errors and contradictions of the technical presentation contained in the Libyan Memorial[1]."

3.25 These propositions are flatly contrary to the statements made by the Court in its 1982 Judgment. The Court quite clearly indicated that even those geomorphological features which do not interrupt the continuity of the continental shelf may still be taken into account in the delimitation process as relevant circumstances[2]. Of course, if the features in question do represent such a discontinuity — as has been demonstrated by Libya — they must necessarily be given greater weight.

3.26 In addition, the vigour with which Malta tries to show these "errors and contradictions of the technical presentation contained in the Libyan Memorial" belies the confidence assumed by Malta in saying that the sea-bed features referred to are "entirely without legal interest[3]". As Chapter 5 below reveals, the simple conclusion is that the Maltese Counter-Memorial and its technical annexes fail to show the "errors and contradictions" alleged to exist in Libya's technical evidence. As for the emphasis placed in the Maltese Memorial, and carried over into its Counter-Memorial, on the assertion that the continental shelf area in question is a "geological continuum", the Maltese Counter-Memorial, in attempting to rebut the significance of the Rift Zone, has itself demonstrated the lack of a "geological continuum[4]".

3.27 The present case falls squarely within the scope of the statements of the Court in the *Tunisia/Libya* case dealing with the possible relevance of physical features of the sea-bed. Libya has furnished to the Court, in the Technical Annex to its Memorial, scientific evidence which establishes that in the present case there are sea-bed and subsoil features breaking the continuity of the continental shelf and constituting an "interruption of the natural prolongation" of Malta and of Libya. To use the language of paragraph 80 of the 1982 Judgment, these features "disrupt the essential unity of the continental shelf" and involve, in the language of paragraph 66 of the same Judgment, "such a marked disruption or discontinuance of the sea-bed as to constitute an indisputable indication of the limits of two separate continental shelves, or two separate natural prolongations".

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[1] *Maltese Counter-Memorial*, para. 42 (footnote deleted).

[2] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 58, para. 68. See also *ibid.*, p. 64, para. 80, where the same possibility is alluded to.

[3] So also does the statement appearing at para. 136 of the *Maltese Counter-Memorial*, citing *I.C.J. Reports 1982*, p. 58, para. 67, in which it is admitted that the Court—

> ". . . certainly did not exclude completely the possibility that a very marked physical separation might serve as a basis for delimitation. Nor did it exclude the possibility that a physical separation which was not as marked might have a function 'as one of the several circumstances considered to be the elements of an equitable delimitation'."

[4] See Chapter 5, below. The fact that the relevant area, that is the area of shelf between the Parties underlying the Pelagian Sea, cannot possibly be regarded as a "geological continuum", and the inherent defects in the term itself, were fully covered in paras. 2.58-2.69 of the *Libyan Counter-Memorial*.

3.28 It is evident that Malta is troubled by the words of the Court quoted in paragraph 136 of the Maltese Counter-Memorial[1]. So the Maltese Counter-Memorial resorts again to casuistry:

> "That two States may adopt physical features as the boundary of their continental shelves (as did Australia and Indonesia in relation to the Timor Trench) is one thing. That a judge or arbitrator should make these same features into a compulsory legal criterion is quite another[2]."

This statement is remarkable in several respects. Apparently, where geomorphological features are concerned State practice loses the legal significance otherwise accorded it by Malta[3]. And the phrase "compulsory legal criterion" rests totally unexplained. The statement also ignores the fact that the Court has clearly said that features characterised in paragraphs 66, 68 and 80 of the 1982 Judgment might indeed constitute relevant circumstances to be taken into account in a given case.

3.29 The Maltese Counter-Memorial then attacks the conception of natural prolongation as having physical characteristics[4]. It stresses the element of chance as relating to the location of sea-bed features; but it is hard to see how one might not try to escape from any geographical or other physical facts on the same basis. It could be regarded as a matter of chance — "as a fact of nature" — that Malta is not still attached physically by land to Sicily and is a group of small islands at all. Libya's position is, and has been from the start of the dispute, that an equitable result must be achieved in the resulting delimitation in the light of all the facts. As Chapter 6 below will develop in some detail, Libya believes that such a result can be achieved by a line within the Rift Zone which reflects all the relevant circumstances of the present case.

3.30 The Maltese Counter-Memorial then develops another line of argument based on State practice[5]. The discussion of the Norwegian Trough and the Hurd Deep in these paragraphs has already been covered in the Libyan Memorial[1]. However, some further comments must be added regarding these paragraphs of the Maltese Counter-Memorial. The very fact that there have been few examples to cite in State practice where geomorphological features appear to have affected the result must be viewed in the light of the following considerations: *first*, it points up the highly special nature and, hence, the significance for the present case of just such features as the Rift Zone and Escarpments-Fault Zone; *second*, as has been brought out in the Libyan Counter-Memorial[2], it is by no means clear what factors States may have considered in reaching agreement on a line of delimitation. The agreements themselves seldom indicate the considerations that were weighed in the balance, a fact borne out by the Australia-Indonesia Agreement which does not expressly mention how and to what extent the Timor Trough was taken into account, although there is clear evidence that it had an important impact on the determination of the boundary line[3].

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[1] See fn. 3 at p. 28, above.

[2] *Maltese Counter-Memorial*, para. 137.

[3] But see paras. 140-150 of the *Maltese Counter-Memorial* where no hesitation is shown to attempt to discredit the relevant sea-bed features on the basis of State practice. In this regard, see para. 4.15, below. See also paras. 5.54-5.60 of the *Libyan Counter-Memorial* dealing with the legal relevance of State practice.

[4] *Maltese Counter-Memorial*, para. 138.

[5] *Ibid.*, paras. 140-150.

3.31 The first point mentioned above — the highly special nature of the sea-bed features in the present case — in fact proves the reverse of what Malta suggests. It may be true that in relatively few cases among existing delimitations have sea-bed features played an important role in the result. This may have been due either to the absence of any such relevant features that might have affected the result in the particular cases or to the fact that they have been outweighed by other considerations (as, for example, in the case of the Norwegian Trough). But where, as here, truly remarkable sea-bed and subsoil features do exist, cutting across the relevant area and, in the case of the Rift Zone, the area of dispute as indicated by the proposals of the Parties and their no-drilling understanding, such features deserve major weight in arriving at a delimitation. It should be added that, in the present case, it is not these features alone that stand out — so also do the entire geographical setting and the coastal relationships of the Parties. We have here a case where the sea-bed features and the geographical setting support each other in leading to the same result.

3.32 It can only be surmised that Malta has had to rely on an interpretation of natural prolongation as a purely "spatial" concept in order to provide a basis for its contention that the physical features of the sea-bed and subsoil are irrelevant. As pointed out in Section A above, however, these arguments are neither in harmony with the jurisprudence of the Court nor with Article 76 of the 1982 Convention as interpreted by the Court.

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[1] *Libyan Memorial*, paras. 6.45-6.51. See also para. 5.33, below.

[2] *Libyan Counter-Memorial*, para. 5.54.

[3] See *Libyan Counter-Memorial*, paras. 5.70-5.75. Nor does Libya agree that the Italy/Tunisia delimitation line does not in the southern part follow the general direction of the Rift Zone. See para. 149 of the *Maltese Counter-Memorial*. Map 13 facing page 130 of the *Libyan Counter-Memorial* can be seen to show otherwise. As to the Italy/Greece delimitation line, para. 150 of the *Maltese Counter-Memorial* is incomprehensible if the map depicting the course of this line found in the Annex of delimitation agreements, No. 51, to the *Libyan Counter-Memorial* is examined. How possibly could the Sicily-Malta Escarpment have been deemed relevant in that case? The line of delimitation generally runs parallel to this feature as well as to significant sea-bed features on the eastern side of the Ionian Sea near Greece. In contrast, Malta proposes a line that would cut across the Escarpment. These situations are entirely different. These two delimitations can be found on the bathymetric chart, *Map 11* facing p. 76.

3.33 The inevitable conclusion to be derived from a close analysis of Malta's legal approach to the present delimitation is that it has undergone considerable evolution since the Maltese Memorial. Natural prolongation and entitlement to areas of continental shelf have been flatly stated to be purely "spatial" in content. Entitlement under Article 76 of the 1982 Convention and delimitation under Article 83 have been intermingled and confused by Malta, in spite of the clear language to the contrary in paragraph 10 of Article 76. By this means, the "spatial" or "distance" concept has been introduced in Malta's pleadings as a dominant factor in the process of delimitation of the continental shelf. Although these contentions fly in the face of the 1982 Convention, they have served several purposes in Malta's pleadings: *first*, to thrust equidistance into the forefront as the primary delimitation only to be adjusted if necessary — but not here — by relevant circumstances, which have been given a secondary, subordinate role; *second*, to push into the background the application of equitable principles to the relevant factors and circumstances of the present case in order to reach an equitable result by claiming for the equidistance method a *prima facie* equitable character and a primary role; and, *third*, to discard as irrelevant geographical factors and sea-bed and subsoil features, regardless of how pronounced they are, that present an insuperable obstacle to the Maltese claims represented by the Maltese equidistance line.

3.34 The arguments in the Maltese Counter-Memorial culminate in the assertion that: "Equidistance is the method by which the primary equitable delimitation is achieved[1]." To this is added:

> "The equitable nature of the primary boundary is then, so to speak, tested and, if necessary, refined by reference to other relevant considerations. Such adjustment or abatement does not involve major re-ordering of the primary delimitation, still less a reapportionment — since no apportionment took place originally."

In this manner, Malta tries not only to do away with potentially troublesome factors of a geomorphological and geological nature but also to diminish to the point of extinction any substantive role for the geographical facts and other relevant circumstances. In so doing, it abolishes the primacy of equitable principles in the delimitation process.

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[1] *Maltese Counter-Memorial*, para. 340.

3.35 What this section has demonstrated is that Malta's conclusions as to the legal relevance of the physical factors is wrong as a matter of law. In the next Chapter the primary role which Malta would ascribe to equidistance will be examined in relation to the additional legal and factual contentions Malta employs to support equidistance as a kind of "primary delimitation" in this specific case.

# CHAPTER 4

## THE INAPPLICABILITY OF EQUIDISTANCE IN THE PRESENT CASE

4.01 Despite Malta's dogmatic adherence to equidistance, the Maltese Counter-Memorial seems to hint at a slight softening of presentation. To the extent this indicates a hint of flexibility in Malta's approach to delimitation, it is welcomed by Libya. Nevertheless, it remains true that, for Malta, equidistance is the method of delimitation warranted by law. The Maltese argument is maintained both as an abstract proposition of law[1] and as an assertion based on considerations claimed to be relevent in this case[2]. It will be appropriate to treat these two different facets of the Maltese argument separately, and then to turn to the new evidence of Malta's "flexibility".

### A. Malta's Thesis of the Primacy of the Equidistance Method

4.02 The previous Chapter has demonstrated the manner in which the Maltese approach to delimitation is fundamentally mistaken. Contrary to Malta's assertions, the so-called "distance principle" does not in law constitute the "controlling element" for continental shelf delimitation either as an abstract notion or as applied in the present case[3]. Nor is there any juridical basis for Malta's contention that equidistance is established as a kind of "primary delimitation" which is *prima facie* equitable in every case[4]. To sustain such a novel thesis one would have to accept equidistance not only as an obligatory method that has an *a priori* or privileged status, but also as equivalent to the basis of title — thereby confusing delimitation with entitlement; and one would have to disregard all the evidence that States are not in fact prepared to concede to equidistance such a role[5]. What remains to be dealt with in this Chapter is to examine the other bases upon which Malta seeks to support its untenable thesis.

#### 1. Delimitation Agreements

4.03 Examples of delimitation agreements entered into by third States have been deployed at considerable length in both of Malta's pleadings. These examples have been discussed by Malta under the heading "State practice", a term which will also be used in the following paragraphs as a convenient short-hand term[6]. They have been used to support several different contentions. With the submission of Counter-

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[1] *Maltese Counter-Memorial*, Chapter II, Section 2 and Chapter IX.

[2] *Ibid.*, Chapters X, XI and XII.

[3] *Ibid.*, para. 156; see para. 3.04, above.

[4] *Ibid.*, paras. 164-166; see para. 3.11, above.

[5] For a review of this evidence see the *Libyan Memorial*, Chapter 7, and the *Libyan Counter-Memorial*, Chapter 5, Section A.

[6] See *Libyan Counter-Memorial*, fn. 7 at p. 104.

Memorials, it is now possible to summarise the principal differences which divide the Parties on this issue and to reveal the misconceptions in Malta's argument as to both the legal relevance of State practice and the interpretations put on individual examples, as well as on the practice as a whole.

4.04 Libya trusts that, with the filing of its own Counter-Memorial, Malta's complaint that Libya has disregarded State practice has been laid to rest[1]. It must be noted, however, that Libya deemed it necessary to submit to the Court an Annex dealing with all the delimitation agreements of which it was aware because Malta's subjective selection of only a portion of these agreements in its Memorial had created an unbalanced picture. It was necessary, therefore, to place Malta's contentions in their proper perspective and to demonstrate that the physical setting of the present case bears little resemblance to other examples of State practice. The fact that the complete picture is now before the Court means that there is no need for Libya to go into this material in extensive detail in this Reply. Libya is confident that the Court is in a position to draw its own conclusions from these agreements. As has already been noted, much of the practice is of marginal legal relevance in any event[2].

4.05 The Maltese Counter-Memorial has introduced, however, several new examples of State practice, and has employed other examples previously referred to in a novel way. These new aspects are conveniently dealt with in this Reply even though, in Libya's view, they do not add anything substantive to Malta's case. Before going into these details, it is first necessary to deal with the principal differences between the Parties as to the general relevance of the ascertainable State practice relating to existing continental shelf delimitations.

### (a) The Import of State Practice and its Limits

4.06 Malta's underlying contention regarding the overall import of State practice is best expressed by the following words found in the Maltese Memorial:

> "Both as a matter of logical necessity and the practice of States in delimitation it was recognised that island States and island dependencies were entitled to a median line delimitation whenever the situation was that of opposite States[3]".

Basing itself on this premise, Malta has attempted to introduce a number of delimitation examples said to be "comparable" to the Libya-Malta situation where the equidistance method was utilised. This Malta has done in order to create the impression that because equidistance was used in these examples, it must, *a priori*, be employed between Libya and Malta in order to produce an equitable result. It is on this series of contentions that the Parties are fundamentally at odds. As will be demonstrated in the following paragraphs, there are three principal defects in Malta's argument.

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[1] See *Maltese Counter-Memorial*, para. 64.

[2] See *Libyan Counter-Memorial*, paras. 5.51-5.60, and para. 4.15, below.

[3] *Maltese Memorial*, para. 154(c).

4.07 *First*, Malta's premise that island States and island dependencies have been "entitled to a median line whenever the situation was that of opposite States" is wrong. There is no particular reason why a median line solution should be preferred in the case of delimitations involving island States or island dependencies. Moreover, State practice does not indicate any such result. It is clear that there is a large number of delimitation agreements where island States and island dependencies have not been accorded a median line in the delimitation of their continental shelves. Examples may readily be found in the Annex of delimitation agreements furnished with the Libyan Counter-Memorial. Perhaps by inadvertence, examples disproving Malta's contention may also be found in the Maltese pleadings themselves, although for the most part Malta has tended to avoid discussing examples of State practice unfavourable to its case[1].

4.08 Using examples found in the Maltese pleadings, however, the following agreements may be advanced as disproving Malta's thesis. In the delimitation between Australia and Indonesia, there can be no doubt that portions of Indonesia's territory (and Indonesia is classified as an "island State" by Malta) received significantly less than equidistance treatment[2]. This is particularly true with respect to the Tanimbar Islands and Timor. Equally true is the fact that the Italian Islands of Pantelleria, Lampedusa, Linosa and Lampione were not accorded a median line delimitation in the Italy-Tunisia agreement. In this respect, even Malta's own conduct disproves its contentions. For Malta has revealed that during its negotiations with Italy over delimitation, Malta proposed that these same Italian Islands should not receive equidistance treatment, but be accorded enclaves instead[3]. Apparently Malta was prepared to take the small size of these Italian Islands into account in this instance despite the fact that they lie "opposite" the Maltese Islands. Finally, it is quite clear that the Channel Islands did not receive equidistance treatment in the *Anglo-French Arbitration* in spite of the fact that they lay "opposite" the French mainland.

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[1] Both the *Maltese Memorial* and *Counter-Memorial* dealt with agreements which incorporated equidistance for at least part of the boundary. Other examples not based on equidistance were largely ignored.

[2] See *Maltese Memorial*, para. 187(c); *Libyan Counter-Memorial*, paras. 5.70-5.75, and the Annex of delimitation agreements, No. 24.

[3] See *Libyan Memorial*, paras. 9.56 and 9.59. See also the presentation of Professor Arangio-Ruiz at the Oral Hearings, Italy's Application for Permission to Intervene (CR 84/1, 25 Jan. 1984, p. 33).

4.09 For the sake of brevity, other obvious examples where islands were not accorded strict equidistance in continental shelf delimitations are listed below in tabular form. Details regarding each of the agreements cited, and maps depicting the actual boundary lines, may be found in the Libyan Annex of delimitation agreements furnished with the Libyan Counter-Memorial.

### *The Netherlands - Venezuela*[1]

The Dutch islands of Aruba, Bonaire and Curaçao did not receive full equidistant treatment, but were accorded substantially less shelf area than equidistance would have provided.

### *Iceland - Norway*[2]

The much smaller Norwegian island of Jan Mayen did not receive full equidistance treatment as against Iceland.

### *France - Venezuela*[3]

The delimitation line falls significantly closer to the small Venezuelan Island of Aves than to the much larger French Island of Martinique.

### *Indonesia - Malaysia*[4]

The delimitation line in the third segment appears to discount the Indonesian islands; the line falls noticeably closer to them than to mainland Sarawak.

### *Kenya - Tanzania*[5]

The delimitation line follows a parallel of latitude in its seaward sector, thus ignoring the presence of Pemba Island.

### *Iran - Saudi Arabia*[6]

The important Iranian Island of Kharg received reduced effect, and two smaller islands lying between the States were partially enclaved.

### *Japan - Korea*[7]

The southern segment of the delimitation forms a joint development zone which lies significantly closer to Japan than to Korea.

### *Bahrain - Saudi Arabia*[8]

In the northern sector, a joint development zone is provided for which appears to fall closer to Bahrain than Saudi Arabia.

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[1] See *Libyan Counter-Memorial*, Annex of delimitation agreements, No. 57.
[2] *Ibid.*, No. 70.
[3] *Ibid.*, No. 67.
[4] *Ibid.*, No. 22.
[5] *Ibid.*, No. 46.
[6] *Ibid.*, No. 17.
[7] *Ibid.*, No. 35.
[8] *Ibid.*, No. 5.

### *Italy - Yugoslavia*[1]

At least three Yugoslav and one Italian island were given reduced effect in the delimitation which essentially took place between two mainland coasts of approximately equal length.

### *Colombia - Panama*[2]

Certain Colombian islands lying in the Caribbean did not receive equidistance treatment.

### *Abu Dhabi - Qatar*[3]

Offshore islands belonging to Abu Dhabi appear to have been enclaved, at least partially.

4.10 The *second* major defect that taints Malta's use of State practice is the assumption that a method of delimitation, because it has been used in particular delimitation situations between other States, must of necessity be employed as between Libya and Malta at least as an *a priori* or "primary" delimitation[4]. Such an argument is a *non sequitur*. It ignores the importance and the individuality of the facts and relevant circumstances of each particular case. As the Libyan Counter-Memorial made clear, existing delimitation agreements rarely indicate the full range of considerations that may have been taken into account by States involved in negotiating a continental shelf boundary[5]. It is dangerous, therefore, to state categorically whether or not a particular characteristic played a role in the ultimate delimitation.

4.11 The Maltese Counter-Memorial asserts, for example, that "State practice does not take account, with but one exception, of trenches, troughs, channels, depressions and other features . . .[6]". How does Malta know? Certainly the Australia-Indonesia agreement did take account of geomorphology, as did the agreement between Saudi Arabia and the Sudan[7]. Geomorphology may also have played a role in the Italy-Tunisia agreement as Counsel for Malta has explained[8]. And there is some evidence to suggest that sea-bed features may also have influenced the Japan-

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[1] See *Libyan Counter-Memorial*, Annex of delimitation agreements, No. 14.

[2] *Ibid.*, No. 48.

[3] *Ibid.*, No. 19.

[4] See *Maltese Memorial*, para. 195.

[5] See generally *Libyan Counter-Memorial*, Annex of delimitation agreements, p. 2, para. 8; and see in particular the comments of the Deputy Legal Adviser of the United States Department of State where he noted that "specific tradeoffs" could be involved in negotiating those agreements; Annex of delimitation agreements, No. 23.

[6] *Maltese Counter-Memorial*, para. 144 (footnote deleted). See, in this respect, para. 3.30, above.

[7] See *Libyan Counter-Memorial*, Annex of delimitation agreements, Nos. 24 and 37.

[8] See *Libyan Memorial*, para. 9.52.

Korea and France-Spain delimitations as well[1]. The extent to which individual features figured in each example, however, is a question that must be left to conjecture. If reference is made to the maps included in the Annex of delimitation agreements, it may be noted that, for the most part, there were no features similar to the Rift Zone which represented fundamental discontinuities in the areas of continental shelf to be delimited and which would have assisted in pointing to an appropriate delimitation.

4.12 It is particularly revealing that the Maltese Counter-Memorial attempts to construct an argument based upon State practice which aims at diminishing the importance of the lengths and configurations of the coasts relevant to the delimitation[2]. Once again, Libya would ask on what basis Malta claims to know how individual States arrived at delimitation agreements and how coastal configurations influenced the end result. If size and coastal length are without relevance, why is it that small islands with correspondingly short coastlines have been enclaved or given reduced effect or even ignored in numerous instances where they face larger landmasses (as in the examples portrayed on *Maps 3* and 5)[3], while in other cases islands have received an equidistance boundary where they faced islands of similar size (as in the examples portrayed on *Maps 4* and 6)[4]?

4.13 Rather than drawing hard and fast conclusions from what amount to a large number of very diverse agreements, Libya believes that State practice, when viewed as a whole, supports the view that each case of delimitation is a function of the particular facts of that case and that, consequently, each case is different and must be approached in the light of its own characteristics and not with any preconceived or *a priori* notion of what constitutes an equitable result[5]. A factor of importance in one example may not be present in another. As a result, State practice does not suggest that the equidistance method possesses a privileged position above all others that is responsive to all different factual situations. Rather, examples of State practice present a wide spectrum of factual situations and a correspondingly wide diversity of methods utilised and solutions reached.

4.14 Malta's attempt to extract rules of delimitation from State practice underlies the *third* major defect in its approach to this practice. In an effort to show that State practice accords the equidistance method a privileged status, the Maltese pleadings have misconceived the legal relevance of such practice to the actual delimitation between Libya and Malta. For what Malta fails to acknowledge is that the situation regarding State practice today is no different than it was in either 1969 or 1982 — the two previous occasions when the Court had occasion to comment on its legal relevance. As was fully discussed in the Libyan Counter-Memorial[1], State practice in the area of continental shelf delimitation does not amount to a "settled practice" as to any particular method. It neither demonstrates that States have felt themselves legally compelled to use a particular method of delimitation nor points to the fact that any one method has an *a priori* or privileged status.

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[1] *Libyan Counter-Memorial*, paras. 5.89 and 5.93.

[2] *Maltese Counter-Memorial*, paras. 252-257.

[3] See, for example, the Iceland-Norway agreement where the larger island of Iceland received a larger area of shelf than Jan Mayen. See also the following examples: Indonesia-Australia; Indonesia-Malaysia; Venezuela-The Netherlands; Tunisia-Italy; Iran-Saudi Arabia; and the *Anglo-French Arbitration*.

[4] See, for example, the agreements between France and Mauritius, New Zealand and the United States, Cuba and Haiti and Australia and France.

[5] Certainly the Libya-Malta setting presents a factual matrix which is like no other and which must be approached in the context of its own peculiar characteristics.

4.15 The irony now presented by the Maltese Counter-Memorial is that Malta itself has acknowledged the limited value of recourse to State practice. In paragraph 145, the Maltese Counter-Memorial takes pains to downplay the significance of the fact that Australia and Indonesia took account of geomorphological features in arriving at their continental shelf boundary. Malta cites with approval an observation made by Judge *ad hoc* Jiménez de Aréchaga in his Separate Opinion to the *Tunisia/Libya* Judgment, and states that "the fact that in one case or another States may decide to fix boundaries of their continental shelves at a trench or depression may not be interpreted as being significant unless there was a legal obligation for them to proceed in this way[2]". In Libya's view, the same must be, and indeed has been, said about the significance of the use of the equidistance method[3]. Absent a legal obligation for States to apply equidistance (and there is no such obligation), examples of State practice where equidistance has been employed prove nothing to support the Maltese thesis.

4.16 The practice of States in the Mediterranean provides first-hand evidence of the potential dangers in drawing general conclusions from individual delimitation agreements. The Maltese pleadings have argued that this practice attests to the "normality and prominence of the equidistance method[4]" and "provides significant indicators as to the proper basis of an equitable solution in the present proceedings[5]". As has been noted during the course of these proceedings, Italy is a party to each of the delimitation agreements concluded thus far in the Mediterranean[1]. Under the Maltese thesis, one would expect Italy to approach delimitation in the Central Mediterranean also on the basis of equidistance. But Italy's position appears to be quite different, as the proceedings devoted to Italy's Application for Permission to Intervene have brought out. Indeed, Counsel for Italy stressed that, although Italy had made use of equidistance for certain parts of delimitations to which it is a party, equidistance "is not an obligatory method for the delimitation of areas of continental shelf[2]".

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[1] *Libyan Counter-Memorial*, paras. 5.54-5.60.

[2] *Maltese Counter-Memorial*, para. 145. As explained in BROWNLIE, I., *Principles of Public International Law*, Clarendon Press, Oxford, 1979, p. 5, citing BRIERLY, *The Law of Nations*, 6th ed.: "What is sought for is a general recognition among States of a certain practice as obligatory". There is no such general recognition among States that application of equidistance, even as a "primary delimitation", is viewed at all as being obligatory.

[3] See, for example, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, pp. 44-45, para. 78.

[4] *Maltese Memorial*, para. 198.

[5] *Ibid.*, para. 200. See also the *Maltese Counter-Memorial*, para. 302.

4.17 It appears that Malta, too, may now be coming around to this view of State practice inasmuch as Counsel for Malta stressed that:

> "The considerations which lead to a particular conclusion in one case do not necessarily lead to the same conclusion in another, even in a neighbouring or possibly overlapping area[3]."

Thus all that existing delimitation agreements show is that boundaries based on equidistance have been used in the past in particular situations where they were equitable or regarded as such by the respective States for reasons valid in those situations. These agreements also show that many other methods have been used as well, each presumably tailored to the individual situations at hand.

### (b) New Interpretations by Malta of Particular Delimitation Examples

4.18 The selective use of State practice which appeared in the Maltese Memorial has been continued in its Counter-Memorial where individual examples are introduced to support three new lines of argument endorsing equidistance. *First*, four cases are cited for the proposition that equidistance — without regard to the requirement of proportionality — had been used in what Malta terms "comparable geographical circumstances[4]". *Second*, the Maltese Counter-Memorial introduces a category of examples involving what it terms "peninsular States" which are apparently designed to show the rejection of any reliance on the ratio of coastal lengths in arriving at boundary lines[5]. *Third*, five examples are advanced which are designed to show that "significant sectors" of a delimitation line may be generated by one or two control points[1].

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[1] See *Libyan Counter-Memorial*, paras. 5.76-5.87. See also the statement by Professor Virally during the Oral Hearings on Italy's Application for Permission to Intervene, (CR 84/3, 26 Jan. 1984, p. 48). It is also of interest to note that Italy was a signatory of U.N. Doc. NG 7/2, Informal Suggestions Relating to Paragraphs 1, 2 and 3 of Articles 74 and 84, ICNT, during the Third Conference on the Law of the Sea.

[2] Statement made by Professor Virally during the Oral Hearings on Italy's Application for Permission to Intervene, (CR 84/3, 26 Jan. 1984, p. 49, English translation).

[3] Statement made by Mr. Lauterpacht during the Oral Hearings on Italy's Application for Permission to Intervene, (CR 84/6, 30 Jan. 1984, p. 16).

[4] *Maltese Counter-Memorial*, para. 253.

[5] *Ibid.*, paras. 255-256.

4.19 As for Malta's *first* category of State practice, the propositions for which the examples are advanced are so totally devoid of any reasoned analysis that it is very difficult for Libya to comment. Malta has presented four maps depicting the following delimitation agreements: Denmark-Norway; Bahrain-Iran; Norway-United Kingdom; and India-Indonesia. Also appearing on each of these maps is a second line labelled "hypothetical proportionality line".

4.20 It is said that the "hypothetical" lines have been constructed "on the basis of proportionality as propounded by Libya[2]". But Libya has never advanced proportionality as a method or line of delimitation. If reference is made either to the background of the dispute or to Libya's discussion of proportionality in these pleadings, it is impossible to see how the Libyan position could possibly form the basis upon which Malta has arrived at these lines. Presumably, they have been drawn on the basis of some proportion calculated by Malta. Presumably also, Malta has employed coastal lengths to arrive at its proportions. But nowhere is it explained how this was done. It is not indicated, for example, which coasts Malta considered relevant to any of the delimitations portrayed and what coastal ratios Malta came up with. It seems likely, however, that Malta is not taking, as the basis for its calculations, the coasts that are actually relevant to the particular area to be delimited. Absent any reasoned analysis to make these examples intelligible, only brief comments need be made at this stage.

### *Denmark (Faroes) - Norway* (Map No. 2, p. 113[3])

4.21 The use of the median line in this situation bears no analogy to the present case. The relevant Danish and Norwegian coasts involved are of approximately equal length. The length of the boundary is restricted by the adjoining U.K.-Norway boundary, so that there is no possibility of the "fan-like" spread to the equidistance line as in the case of Malta. It should finally be noted that the Faroes may be regarded as "opposite" to only a very short stretch of Norwegian coast[4], quite unlike that of Libya.

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[1] *Maltese Counter-Memorial*, paras. 274-278.

[2] *Ibid.*, para. 253.

[3] References in the parentheses to this delimitation agreement, as well as to those that follow, are to the *Maltese Counter-Memorial*.

[4] See *Libyan Counter-Memorial*, Annex of delimitation agreements, No. 62. And for detailed comment on this agreement, see *Libyan Counter-Memorial*, paras. 5.65-5.66.

*Bahrain - Iran* (Map No. 3, p. 114)

4.22 The same comment may be made here. Given the broad equality of the coasts on opposite sides of the Gulf, the median line is the obvious, and equitable, solution. The length of Iranian coast deemed "opposite" to Bahrain is in fact very limited.

*Norway - United Kingdom* (Map No. 4, p. 115)

4.23 The Maltese Counter-Memorial mistakenly construes this example as a delimitation between Norway and the Shetland Islands. In fact, the delimitation is between Norway and Great Britain so that the delimitation cannot be interpreted as being solely one employing a median line which divides the shelves of Norway and the Shetland Islands *per se*. The shelf area attaches to the British Isles as a whole, and not to the Shetland Islands. Of course, the coasts of Scotland and northern England are also relevant to the delimitation and face a length of Norwegian coast which is comparable.

*India - Indonesia* (Map No. 5, p. 116)

4.24 This is a modified median line between two very short coasts, including on the one side the Nicobar Islands belonging to India and on the other a group of several smaller islands — including Rondo Island — belonging to Indonesia. This situation is not analogous to that of Libya-Malta[1].

4.25 Thus, not one of these examples is similar to the situation now before the Court. In addition, the construction of "proportionality" lines, being unsupported by any explanation enabling the examples to be understood, is meaningless. What Malta has actually demonstrated is an unwillingness to appreciate and grapple with the factual setting of each example that has been put forward. As in the present case, so also in its hypothetical constructs, Malta has failed to identify which coasts are genuinely relevant to the delimitation.

4.26 In the *second* category of examples referred to in the Maltese Counter-Memorial the notion of so-called "peninsular States" is introduced. Five examples are put forward but, here again, it is unclear precisely what these examples are designed to show. As the maps themselves demonstrate, none of these new examples is at all comparable to the Libya-Malta setting. Accordingly, although a brief comment on each example is offered below, Libya respectfully refers the Court to the Annex of delimitation agreements which accompanied Libya's Counter-Memorial where a fuller treatment of these examples, together with a map of each, may be found.

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[1] See *Libyan Counter-Memorial*, Annex of delimitation agreements, No. 41. See also *Map 7*, facing p. 44, below.

### *Denmark - Norway* (Map No. 6, p. 118)

4.27 This is a median line between two broadly equal and similar coasts[1]: the coasts are initially opposite (in the Skagerrak) and then assume a lateral relationship (facing the North Sea). The median line in fact respects the broadly equal ratio of the two coasts.

### *Iran - Qatar* (Map No. 7, p. 119)

4.28 As indicated above, this median line boundary lies between two broadly equal, and similar, coasts in a very shallow area.

### *United Kingdom - Denmark* (Map No. 8, p. 120)

4.29 This is a very short line (only about 11 nautical miles long) and is also restricted by other boundaries running up the North Sea and lying between broadly equal coasts[2]. The Danish coast has to be seen, not in isolation, but as a sector of the coast which stretches from the Netherlands, to the Federal Republic of Germany, to Denmark and to Norway: and all of the coast is opposite the United Kingdom. The North Sea is typically an area where, save for the special problem of the German concave coast, a median line will effect a roughly proportionate allocation of shelf areas in the ratio of coastal lengths. As such, there is little similarity to the Libya-Malta situation.

### *Iran - Oman* (Map No. 9, p. 121)

4.30 Like the Bahrain/Iran and Qatar/Iran boundaries, this is simply one segment of a long, overall boundary between opposite coasts that are roughly comparable in length, if not entirely equal[3], in an area where there is no significant sea-bed relief.

### *Australia - Papua New Guinea* (Map No. 10, p. 122)

4.31 The comment in the Maltese Counter-Memorial is that "Cape Yorke Peninsula and its off-lying islands have been given normal weighting". As the map itself shows, the Torres Strait is narrow, and the Cape Yorke Peninsula is enormous. In essence, the delimitation line falls between two stretches of coast which are roughly equal in length. Thus, it is impossible to discern the analogy with the Libya-Malta situation.

4.32 The purpose of the first two categories of State practice referred to in the Maltese Counter-Memorial appears to be twofold: *first*, to demonstrate the adoption of median line delimitations in State practice, and, *second*, to prove the irrelevance of coastal configurations and the ratio of coastal lengths. What the review actually achieves is precisely the opposite. It simply demonstrates the rather obvious fact, noted repeatedly in the Libyan pleadings, that with broadly equal, opposite coasts, and absent any other distinct features or circumstances, the median line will normally afford an acceptable solution because it will, in practice, effect a delimitation of shelf areas in proportion to the length of the relevant coasts. The problem in the present case arises for two reasons which are peculiar to this case and which have no counterpart in the examples used by Malta. The first reason is the existence of a fundamental discontinuity between the two shelf areas — the Rift Zone — and the second reason is the glaring disparity in the coastal lengths of Libya and Malta. In other words, the essential justification for the median line solution in the illustrations of State practice used by Malta is not present in the Libya-Malta situation: there is simply no analogy.

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[1] *Libyan Counter-Memorial*, Annex of delimitation agreements, No. 12.

[2] *Ibid.*, No 13.

[3] *Ibid.*, No. 40.

4.33 As noted above, there is a *third* use to which State practice is put in the Maltese Counter-Memorial[1]. This is to show that a limited number of basepoints can "generate" a long segment of a delimitation line and, thus, a large area of shelf. Five examples are given; yet, as a close examination of them reveals, they do not offer any similarities to the present case. In the analysis of these boundaries Malta confuses the basepoints which are used for the construction of a line (such as an equidistance line) with the relevant coasts from which the land territory extends into and under the sea, and which generate the coastal State's entitlement to continental shelf.

4.34 The first example — the delimitation between Norway and the United Kingdom — illustrates how the tip of the Shetland Islands controls the construction of the northern portion of the line. It fails to indicate, however, which points were influential on the Norwegian coast. Malta has simply decided not to draw in the corresponding lines. Libya suspects that perhaps only one point on Norway's coast would have controlled the northern sector of the line, too. All this shows, therefore, is that single points on each side acted as basepoints for the construction of the boundary. This does not mean, however, that there was a disproportion between the lengths of the relevant coasts involved as there is in the present case between the length of relevant Libyan coast and that of Malta.

4.35 The maps showing control points for the Bahrain-Iran, Denmark-United Kingdom and India-Indonesia agreements are equally meaningless. In the first two cases, again, a single point controls the line on each coast. This only illustrates how a limited stretch of coast of *each* State can properly be identified as being pertinent to the delimitation. The significant fact is that the coasts involved were roughly equal in length and there were no fundamental discontinuities between clearly distinguishable shelf areas on each side. As for the example of the delimitation between

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[1] See *Maltese Counter-Memorial*, paras. 275-278 and the maps on pp. 135-139, therein.

India and Indonesia, the Maltese map demonstrates that the coastal lengths or coastal fronts on the Nicobar Islands, on the one hand, and on Indonesia (or between the two small islands lying just offshore), on the other, were approximately equal. *Map 7* illustrates this example and shows the manner in which the examples chosen by Malta bear little similarity to the Libya-Malta situation. Absent any other compelling circumstances in the India-Indonesia example, one would expect an equidistance line to be drawn between such comparable coasts.

4.36 All the examples illustrate the same fundamental error. The error lies in assuming that it is the basepoints as such which "generate" a shelf area. The truth is that the shelf is a prolongation or extension from the coast of the landmass or land territory (not of one or more basepoints) into and under the sea, and the area of shelf attaching to a coastal State is an extension of the landmass of that State, normally measured and represented by its coastal length. What determines the appropriate method of delimitation is the relationship of the two landmasses and the two coasts, viewed in the context of all the relevant circumstances. It may well be that the relationship is such that the appropriate method is not equidistance — as in the situations before the Court in its 1969 and 1982 Judgments — in which case the basepoints become totally irrelevant, since application of the appropriate method will not depend upon them. Even where equidistance, in one form or another, strict or modified, is an appropriate method, the shelf area is "generated" by the respective landmasses and coasts, and how many basepoints are used to construct the boundary line which properly reflects the relationship between the two coasts is often purely fortuitous, depending on the configuration of the coasts in question. The sectors actually shown by Malta show the use of *two* (Norway/U.K.), *one* (Bahrain/Iran), *one* (U.K./Denmark), *five* (Spain/Italy)[1] and *five* (India/Indonesia) basepoints. But what does this prove? It proves nothing more than, given that the relationship of the two landmasses and the relevant lengths of the two coasts justified the use of the equidistance method, the particular delimitation line was arrived at by the use of one or more basepoints on each side. Yet to assert that it is the basepoints which "generate" the shelf, and that somehow equidistance can alone reflect the relevant coasts, is simply incorrect.

4.37 In summary, what is significant about the Maltese use of State practice is its inability to find any example really comparable to the Libya-Malta setting. This emphasises the importance of the point made by Libya, namely, that the appropriateness of any method of delimitation depends on the particular facts of each case and that there is no basis for a claim that any method has a privileged, let alone obligatory, character.

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[1] Four basepoints on Minorca; five on Sardinia.

## 2. Other Considerations Advanced by Malta

4.38 The remaining arguments raised by Malta to support equidistance as a legal principle center around four main contentions already discussed in considerable detail in the the Maltese Memorial: (i) the alleged "general toleration" of the equidistance method by the international community; (ii) the need for finality and stability in the use of delimitation methods; (iii) the alleged support for Malta's position in the jurisprudence; and (iv) the principle of the equality of States. Since the Maltese Counter-Memorial has only mentioned these aspects in most summary fashion without adding any substantive argument, comment here can be brief[1].

4.39 In Chapter IX of its Counter-Memorial, Malta relies on the so-called "general toleration" of the international community in support of the assertion that equidistance is the equitable solution, sanctioned by State practice and "analogous considerations", referring to the *Anglo-Norwegian Fisheries* case where the Court had used this argument with respect to the Norwegian straight baselines system[2]. Apart from the fact that there is not the slightest evidence of such a "general toleration" or acquiescence in Malta's claim for equidistance boundaries around its coast, the best evidence against such a "general toleration" can be found in the proceedings of the Third Conference on the Law of the Sea. As pointed out in detail in the Libyan Counter-Memorial[3], the proceedings of this Conference and the final version of Article 83 of the 1982 Convention on the Law of the Sea demonstrated the absence of any consensus on the acceptance or "toleration" of equidistance as the primary or preferred method for continental shelf delimitation. It is a travesty of the history of the Conference, and a misrepresentation of the general opinion of the international community, to pretend that there exists general support amongst States for the idea that equidistance has a special, preferred status and is accepted as being generally synonymous with an equitable result[4].

4.40 Malta then argues that because quite a number of existing delimitation agreements — some of them allegedly in situations "comparable to that of Malta and Libya" — have made use of the equidistance method, it would create an "atmosphere of uncertainty" if the Court were to sanction a different method in this case[1]. This argument also merits only the briefest response. *First*, Malta has been unable to disclose any existing delimitations which are in situations truly comparable to that of Libya and Malta. *Second*, the whole trend of the Court's Judgments in 1969 and 1982, and the Court of Arbitration's Award in 1977, has been to stress the specific characteristics of each particular situation, and to base the appropriateness of a method of delimitation on those specific characteristics. And, *third*, there is no evidence that States rely on the expectation that the Court would, in principle, endorse the equidistance method as the preferred method most likely to yield an equitable result. Indeed, given the widespread opposition to even mentioning equidistance in Article 83 of the 1982 Convention, it is inconceivable that States would have agreed to the final wording of that Article had they expected the Court to endorse the general applicability of the equidistance method.

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[1] See, for example, Chapter IX of the *Maltese Counter-Memorial*. For a detailed rebuttal of these contentions initially introduced in the *Maltese Memorial*, see generally the *Libyan Counter-Memorial*, Chapters 3, 4 (B) and 5.

[2] The citation to the *Anglo-Norwegian Fisheries* case in support of this proposition, at p. 146 of the *Maltese Counter-Memorial*, is offered without further explanation, and wisely so since it had absolutely nothing to do with continental shelf delimitation or with the status of the equidistance method.

[3] *Libyan Counter-Memorial*, paras. 5.29-5.33.

[4] See *Libyan Memorial*, Chapter 7, and *Libyan Counter-Memorial*, Chapter 5.

4.41 It remains part of the Maltese legal argument that the jurisprudence in matters of continental shelf delimitation, namely the two Judgments of the Court in 1969 and 1982, and the Award of the Court of Arbitration in 1977, does not controvert Malta's thesis of the preferred status of equidistance as the most appropriate method apt to produce an equitable result[2]. Clearly, Libya does not share this view of the import of those decisions[3]. In neither of its Judgments did this Court adopt equidistance, and it expressly denied to equidistance any obligatory or preferred status as a method which has to be tried as a "first step" in delimitation[4].

4.42 It is, of course, true that in the *Anglo-French Arbitration* the Court of Arbitration adopted for parts of the boundary a method based on equidistance. However, in that case both States were parties to the 1958 Convention[5], and their mainland coasts were broadly equal in length with no fundamental discontinuities of the sea-bed or subsoil lying between[6]. Moreover, in relation to the two groups of islands which created the real difficulties in the delimitation — the Channel Islands and the Scilly Isles — the Court of Arbitration used a 12-mile enclave and "half-effect". So even this decision lends no support to the Maltese thesis.

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[1] *Maltese Counter-Memorial*, paras. 299-300.

[2] *Ibid.*, paras. 164-171.

[3] For the Libyan analysis of those decisions see the *Libyan Memorial*, paras. 6.11, 6.20, 6.23, 6.56-6.59 and the *Libyan Counter-Memorial*, paras. 5.03-5.09.

[4] See *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, pp. 35-36, paras. 55-56; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, pp. 78-79, paras. 109-110.

[5] Although, it must be added, the Court found that, by reason of the French reservation, Article 6 did not apply to the Channel Islands sector.

[6] The Court of Arbitration went out of its way to stress the overall equality of the mainland French and British coasts, mentioning this equality no less than four times in the space of six paragraphs in its Award: *Anglo-French Arbitration, Decision of 30 June 1977* (Cmnd. 7438), pp. 93-95, paras. 196-201.

4.43 The Maltese Counter-Memorial in fact concedes that "at first sight" the reasoning of the 1982 Judgment appears contrary to Malta's thesis[1]. But then Malta attempts to distinguish the 1982 Judgment on two grounds. The first is that the Court was not dealing with opposite coasts. Yet the Court noted expressly that, in the second sector, the relationship between the Tunisian and Libyan coasts was largely transformed "from that of adjacent States to that of opposite States[2]". The second is that the Court's Judgment was specific to the facts of that case. But of course! It is precisely Libya's position that the method which is appropriate must be determined on the facts of each case, and it is Malta which seeks to confer on equidistance some general, abstract virtue as a method appropriate in all cases of opposite coasts. Thus, neither of the alleged grounds for distinction in fact serves to support Malta's attempt to construe the 1982 Judgment as a decision in favour of Malta's thesis.

4.44 The Maltese Counter-Memorial also seeks to prove, by reference to the 1982 Judgment[3], that in practice Courts do use equidistance as a starting-point, whatever they might say. The argument is that otherwise the Courts could not decide whether or not equidistance produced an inequitable result without first trying that method. But this is pure speculation and does not address the real issue. In any event, a Court's preliminary essay, perhaps involving a whole series of possible methods, does not involve giving to any one of those methods a preferred or special status. As the Court has said, it is the coasts that provide the starting point[4], not the method, so that whichever method is used in the initial, tentative essay by a Court, it is still the result of the Court's evaluation of the coasts and other relevant factors, and not the result of that method having some special status.

4.45 In the light of these contentions, it comes as something of a surprise to find the Maltese Counter-Memorial conceding that there has been a "toning down of equidistance" over the past 15 years[5]. Malta argues that this "toning down of equidistance" does not mean that use of the equidistance method always produces an inequitable result. Of course this is true, and Libya is well aware that in certain circumstances an equitable solution can be achieved by use of either strict or modified equidistance just as under other circumstances different methods are called for. But this hardly supports the Maltese contention that equidistance must be used as a first step — as a kind of "primary delimitation" which is presumed to be equitable until proven otherwise. The jurisprudence upon which Malta has sought to rely suggests precisely the opposite approach whereby no single method may be said to possess an *a priori* validity. As the Maltese Counter-Memorial admits, "equidistance cannot *always* be regarded as equitable[1]".

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[1] *Maltese Counter-Memorial*, para. 170.

[2] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 88, para. 126. In addition, it may be noted that the Court took account of both lengths of Tunisia's coast for purposes of applying the proportionality test.

[3] *Maltese Counter-Memorial*, para. 170. It may be noted that the references really relied on by Malta in para. 171 are to separate or dissenting opinions.

[4] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 61, para. 74.

[5] *Maltese Counter-Memorial*, paras. 163-164.

4.46 The final argument to which Malta has resorted rests upon the principle of the equality of States. The Maltese Counter-Memorial spared no effort in pressing its claims on this point, going so far as to accuse Libya of misunderstanding "the fundamental principle of the sovereign equality of States[2]".

4.47 Libya's views on the principle of equality of States and the applicability of this principle to matters of continental shelf delimitation were fully discussed in the Libyan Counter-Memorial and need not be amplified here[3]. However, it may be pertinent to recall that the issue of the equality of States was raised by one of the parties to a previous case involving continental shelf delimitation — the *Anglo-French Arbitration*. As a result, the Court of Arbitration had occasion to comment on this principle and its relation to questions of delimitation. In language which is crystal clear in its import and which disposes of the Maltese contention, that Court stated:

> "In the opinion of the Court, the doctrine of the equality of States . . . cannot be considered as constituting such an equitable ground. The doctrine of the equality of States, applied generally to the delimitation of the continental shelf, would have vast implications for the division of the continental shelf among the States of the world, implications which have been rejected by a majority of States and which would involve, on a huge scale, that refashioning of geography repudiated in the *North Sea Continental Shelf* cases. Any ground of equity, the Court considers, is rather to be looked for in the particular circumstances of the present case and in the particular equality of the two States in their geographical relation to the continental shelf of the Channel[4]."

4.48 The conclusion that may be drawn from an examination of all the legal grounds which Malta puts forward to support its claim for equidistance as the method required by law is that this claim is without substance. Neither State practice, nor the record of the Third Conference on the Law of the Sea, nor the judicial precedents, nor the concepts of "finality" and "general toleration", nor the principle of equality of States afford any support for the Maltese thesis. It is necessary, therefore, to turn to Malta's use of the "facts" of the present case in order to show that they do not give any support to Malta's thesis either.

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[1] *Maltese Counter-Memorial*, para. 164.

[2] *Ibid.*, para. 13. By allegedly disregarding this principle, Libya is also said to be refashioning geography; *ibid.*, para. 328.

[3] *Libyan Counter-Memorial*, paras. 4.02-4.08.

[4] *Anglo-French Arbitration, Decision of 30 June 1977* (Cmnd. 7438), p. 93, para. 195.

### B. The Maltese Argument to Justify Equidistance Based upon Considerations Claimed to be Relevant

4.49 Chapter X of the Maltese Counter-Memorial begins with the proposition that the coasts of the Parties indicate the "primary delimitation" (which in Malta's view is equidistance), and that the equity of this primary delimitation must then be tested in the light of other relevant factors[1]. These appear to be six in number, namely:

(i) Malta's special dependence upon sea-bed energy resources;
(ii) Malta's requirements as a developing country;
(iii) Malta's considerations of national security;
(iv) Malta's range of fishing activity;
(v) the conduct of the parties; and
(vi) the constriction of Malta's continental shelf by the presence of third States in the region.

4.50 It has to be said that, in outlining these factors, the Maltese Counter-Memorial contains nothing new as to the facts, and simply repeats arguments already made in the Maltese Memorial. These have already been dealt with in the Libyan Counter-Memorial[2] (and, in the case of Malta's claims relating to the conduct of the Parties, in Chapter 2 above). It is only necessary, here, to emphasise three points. The *first* is that Malta treats as "relevant" factors those very economic and political factors which Courts have already rejected as being irrelevant and extraneous to shelf delimitation[3]. The *second* is that these alleged factors still lack real substance. For example, we are still not told what the security considerations are which concern Malta (except in the most general sense that all States are said to be concerned to control activities immediately off their coasts[4]). Nor are we given any more evidence about Malta's alleged fishing activities in the area in dispute. And the reference to delimitations vis-à-vis third States remains one of extreme vagueness[5]. Yet it is the *third* point which needs most emphasis, for it remains the case that nowhere does Malta explain why any of these factors point to, or relate to, an equidistance line as the method which would reflect the balancing of these factors and would lead to an equitable result. Why do economics or fishing practices or the presence of third States point to equidistance in this case? Why not an enclave of 25 miles to be consistent with Malta's 25-mile fishing zone? Or 24 miles to be consistent with Malta's contiguous zone, or even less to be consistent with Malta's view as to how the Italian Pelagian Islands should be treated?

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[1] *Maltese Counter-Memorial*, paras. 303-306.

[2] *Libyan Counter-Memorial*, Chapter 3 (paras. 3.02-3.46) deals with the economic, fishing, security and other political arguments advanced by Malta; Chapter 1 deals with the conduct of the Parties; and Chapter 2, A. 4 (paras. 2.18-2.28) with the presence of third States.

[3] *Libyan Counter-Memorial*, para. 3.02.

[4] *Maltese Counter-Memorial*, para. 314.

[5] *Ibid.*, paras. 317-318.

4.51 It might have been thought that answers to these questions would be found in the following Chapter XI of the Maltese Counter-Memorial, which sets out the significance of the legal framework of this particular delimitation, but that is not so. All Chapter XI does is to restate, in the most abstract terms, the four "significant" principles of non-encroachment, equitable considerations[1], "distance", and equality of States. So one is no nearer to understanding what exactly are these relevant factors that confirm the equitable nature of the equidistance line in this particular case. They would appear to be a matter of mere assumption rather than of factual demonstration or logical argument. Not surprisingly, therefore, exactly the same difficulty is faced in attempting to discern the elements of the new "flexibility" hinted at in the Maltese Counter-Memorial.

### C. Hints of "Flexibility" in Malta's Approach to Equidistance

4.52 It is not entirely clear whether, according to Malta, consistency[2] or flexibility[3] is the more virtuous. Be that as it may, certainly one notable feature of the Maltese Counter-Memorial is its recognition that equidistance may not be the appropriate boundary in the present case. Indeed, Malta admits to the "toning down of equidistance[4]" and to the fact that equidistance does not always produce an equitable solution. In the words of the Maltese Counter-Memorial—

> " . . . in order to avoid all misunderstanding, Malta considers it necessary to state that in adopting this equidistance line as the starting point of the delimitation process, it does not intend in any way to suggest that the equidistance line must necessarily be — in some inherent way — the appropriate boundary in every case, *or even in the present case*[5]."

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[1] These, listed at para. 330(j), are in large part a repetition of the considerations already set out in Chapter X.

[2] See the Maltese tribute to the consistency of its position, and its criticism of the alleged change in the Libyan position, in the *Maltese Counter-Memorial*, Chapter V, paras. 261-269.

[3] *Maltese Counter-Memorial*, paras. 163-165.

[4] *Ibid.*, para. 163.

[5] *Ibid.*, (italics added).

The idea now being put forward seems to be that the geographical relationship between the two coasts dictates a *primary* delimitation[1]; that, in the case of opposite coasts (or States), this is the median line which is *prima facie* equitable[2]; and that this line may be adjusted in the light of all the relevant circumstances[2]. This adjusted line would presumably give the *secondary* (and final) delimitation, being the line which reflected all the relevant circumstances.

4.53 The idea of a primary and secondary delimitation is clearly not the same as that used by the Court of Arbitration in the *Anglo-French Arbitration* of 1977[3]. There the Court had drawn a median line boundary between the two, broadly equal mainland coasts as a first stage and then turned to the particular problem of the Channel Islands as a second stage in devising an equitable solution for those islands by a second, separate boundary: in the event, a twelve-mile enclave. But here the Maltese Memorial says expressly—

> " . . . the process of delimitation does not involve two successive stages any more than the application of equity, in other spheres of international law, involves the successive application of a general rule followed by the application of a particular rule which derogates from it. Equity consists not in that, but in a reasonable application, taking into consideration all the circumstances of the case, of the general rule[4]."

4.54 So, if the delimitation process is not to be separated into two stages, of what does the "primary" delimitation consist? It is not possible to discern the answer to this question with any clarity from the Maltese pleadings. It would seem that Malta still has in mind a median line which is legally presumed, *prima facie*, to be equitable. Although Malta claims to be willing to test that presumption by reference to the relevant factors, this never materialises. Theoretically according to the Maltese framework, that "testing process" could lead either to confirming the line as an equitable result, or modifying it to conform to an equitable result. But in either case, evidently, the median line has a preferred or privileged status because of the presumption. However, as Libya has shown[5], neither this proposition, nor the Maltese approach which relegates the role of the relevant circumstances to one of secondary importance, is consistent with the law.

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[1] *Maltese Counter-Memorial*, paras. 162-163. But note that we are still not told precisely which are the two relevant, opposite coasts.

[2] *Ibid.*, para. 166.

[3] *Anglo-French Arbitration, Decision of 30 June 1977* (Cmnd. 7438), paras. 201 ff.

[4] *Maltese Counter-Memorial*, para. 176 (italics deleted).

[5] *Libyan Counter-Memorial*, Chapter 6. See also Chapter 3, Section B, above.

4.55 In the present case, it is Malta's view that the relevant circumstances confirm the equitableness of the median line. However, as shown in Section B above, there is no means of knowing why this may be so, since Malta has failed to explain why or how the circumstances alleged by Malta to be "relevant" support that specific line of delimitation.

4.56 It necessarily follows that the flexibility hinted at in the Maltese Counter-Memorial does not really materialise. It remains, for Malta, a purely theoretical idea precisely because Malta proceeds on the basis of a presumption of the equitableness of the median line and totally fails at any stage to test that presumption by reference to the actual, relevant facts of this particular delimitation or by reference to the criterion of proportionality.

# CHAPTER 5

## ISSUES REGARDING THE PHYSICAL FACTORS AND CIRCUMSTANCES OF THE PRESENT CASE[1]

5.01 On the geographical plane, the Maltese Counter-Memorial has added little to the treatment accorded geography in the Maltese Memorial. Nor has it called into question the geographical facts set forth by Libya in its Memorial. The principal new material in Malta's Counter-Memorial relates to geomorphology and geology. Here too, however, the Maltese Counter-Memorial and accompanying technical annexes have not seriously disputed the geomorphological and geological facts adduced by Libya[2]. This should come as no surprise, for the scientific facts are straightforward and are based on objective, readily observable data[3].

5.02 Yet the Maltese Counter-Memorial has sought to create a rather different impression. To this end, it has resorted to the technique, noted earlier, of misstating Libya's position as to the facts both in this case and in the previous case between Libya and Tunisia. It has also tried to demonstrate inconsistencies in Libya's presentation, division amongst the scientists, and even a certain liberty on the part of Libya in dealing with the facts. These techniques seem aimed at giving the misleading impression that there is significant disagreement between the scientists advising the two Parties and even amongst those advising Libya; that the Libyan case includes distortions of the evidence; and that the scientific facts are too complex or ambiguous to be of value to the present case.

5.03 Such an outcome would probably be welcomed by the other Party, which favours a solution couched in abstraction and bolstered by tenuous analogies with other delimitations. Libya regards the facts of the particular case to be a critical element in the resolution of the dispute and believes that they are sufficiently unambiguous to enable them to be balanced up so as to achieve an equitable delimitation. Indeed, the Memorials and Counter-Memorials already before the Court show that by and large the scientists on both sides have come to the same general conclusions.

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[1] See *Libyan Counter-Memorial*, fn. 2 at p. 23, where the term "physical factors" is defined to include features of a geographical, geomorphological and geological character.

[2] There are, however, certain errors of facts and differences of interpretation that will be dealt with further on in this Chapter.

[3] It is of interest to note that during the Oral Hearings on Italy's Application for Permission to Intervene, Italy's description of physical factors relevant to the present case closely approximated that given by Libya, (CR 84/1, 23 Jan. 1984, pp. 37-39).

### A. Geographical Facts

5.04 Malta's neglect of coastal details was brought out in Libya's Counter-Memorial; it was contrasted with the detailed treatment given by Libya to the coastal geography of both Libya and Malta[1]. The entire first Chapter of Malta's Counter-Memorial is a transparent deformation of the geographical facts put forward by Libya, making any detailed refutation of the many exaggerations (such as Malta being represented as "not really an island" or, if so, as a one-sided, or a "kind of unilateral island") seem hardly necessary at this stage. However, when the Maltese Counter-Memorial asserts in paragraph 10 that Libya regards the coasts of Malta to be "insignificant", it entirely misses the point. The lengths of the coasts of the Maltese Islands as well as those of Libya, the directions in which they face, their configurations, and their relationships to each other and to the areas of continental shelf to be delimited are all geographical factors that have major significance in the present case. These involve matters of fact rather than of opinion. They must be examined as they actually are and not on the abstract, hypothetical plane upon which the analysis in the Maltese pleadings rests.

5.05 Given the extensive description of the coasts of the Parties in the Libyan Memorial, some factual discussion of the coasts might have been anticipated in the Maltese Counter-Memorial. There is virtually none — merely a series of broad assertions (strongly reminiscent of the Maltese Memorial) together with the same lip-service given to the importance of geography as a factor in delimitation. To Libya's detailed description of the coasts of the Parties is opposed the assertion by Malta that they are "facing coasts"; to Libya's analysis of the "relevant coasts" and the "relevant area" is opposed a geometrical construct — the trapezium. It is as if Malta could not deal with the actual facts of the case and has been compelled to invent a geographical case divorced from these facts and built instead around abstractions and hypotheses[2]. Yet, in so doing, Malta has not put into dispute the actual facts set forth and illustrated in Libya's pleadings[3].

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[1] *Libyan Counter-Memorial*, paras. 2.30-2.35; 2.43-2.44. It is, thus, remarkable to find the title of the initial Chapter of the *Maltese Counter-Memorial* to read: "The Substance of the Libyan Case: Malta Disregarded". See para. 3, above, of the Introduction to this Reply and fn. 2 at p. 2.

[2] Similarly, Malta's constant resort to examples taken from State practice in quite different geographical settings is an attempt to escape from the geographical realities of the present case.

[3] The *Libyan Counter-Memorial* added some commentary on the Maltese baselines that had made their first official appearance (to the knowledge of Libya) in the *Maltese Memorial*, and any remarks of Malta regarding these baselines presumably will appear in its Reply. However, it may be noted that the Maltese baselines demonstrate how little of Malta's very short lengths of coast, facing as they do the coasts of third States, may be regarded as facing the coasts of Libya.

5.06 The Maltese Counter-Memorial has made it increasingly clear that not only does Malta regard the factor of coastal lengths as irrelevant to delimitation, but also that the only geographical factors that it regards as relevant are the "oppositeness" of the coasts of Malta and Libya and the "considerable distance" separating them[1]. To these is added the "absence of intervening islands or other unusual features". The relationship of the coastlines of Libya and Malta is described as "remarkable only in terms of its normality[2]".

5.07 From these conclusions of "fact", Malta asserts that, since the "primary elements in the geographical facts are uncomplicated", each "pertinent coast should be given its appropriate legal significance on the basis of the distance principle and the use of controlling basepoints[3]". Stated in different words, Malta asserts (after suggesting that the Libyan Memorial shows a certain "obsession" with the length of the Libyan coastline) that the "location and relation of coastlines are the over-riding factors and the dominant geographical features in consequence is [*sic*] the position of Malta at a distance from the Libyan coast and the absence of any intervening islands or other unusual features[4]."

5.08 It is impossible to accept these assertions as constituting a serious treatment of the geography that characterises the present case. Which coasts of Malta and Libya are "opposite" to each other and relevant to the delimitation? What is the "appropriate legal significance" which Malta contends each stretch of coast should receive? What is the factor of distance between the coasts of the Parties that is said to be of such significance and how is it significant — and between which coasts? Compared to other situations around the world, what is "normal" about the relationship between the coastlines of Libya and Malta, a relationship not in any way described other than to state that certain unspecified coastlines are said to bear an opposite relationship to each other? An island necessarily has an opposite relationship to surrounding coastal States. But not all of its coasts are opposite to all of the coasts of these surrounding States any more than Valletta can be said to lie opposite to Tripoli, and not all of its coasts are necessarily relevant to a particular delimitation with any one of these neighbouring States.

5.09 As was pointed out in the Libyan Memorial[5], the preliminary question to be answered regarding the coasts of the Parties is what relationship, if any, particular portions of the coast of each Party have with each other and with the area of continental shelf to be delimited. This question cannot be answered in abstract terms. It has significance only in the context of the actual delimitation of maritime areas lying between the two States and bearing in mind the presence of third States and third State delimitations. Italy's Application for Permission to Intervene in the present case and the resulting Judgment of the Court in the matter brought this point home very clearly. However, this essential question goes unanswered by Malta which seeks refuge in "oppositeness" as a general, abstract concept and in basepoints which cannot be said to "face" in any direction[1].

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[1] See, *e.g.*, the *Maltese Counter-Memorial*, para. 270.

[2] *Ibid.* See also para. 3.20, above.

[3] *Maltese Counter-Memorial*, para. 270.

[4] *Ibid.*, para. 274.

[5] *Libyan Memorial*, para. 10.08.

5.10 Libya believes that a reasonably precise determination of these relationships is essential and that this requirement does not vanish merely because an island is involved, the coasts of which necessarily bear a relationship with the coasts of other States surrounding this island. The special geographical position of Malta is that of a group of small islands almost surrounded by continental States in a constricted sea. Only a part of the coasts of the various Maltese Islands can count in respect to continental shelf delimitation with each surrounding State. The fact that Malta is a group of small islands necessarily leads to another result that seems to have eluded Malta — it is bound ultimately to be enclaved, whatever means of delimitation are agreed between Malta and its neighbours[2]. It is tempting, therefore, by way of rejoinder to suggest that it is Malta which is ignoring itself in the present case.

5.11 The "relationship/distance" theme reappears in paragraph 245
㉑ of the Maltese Counter-Memorial where diagrams are used (Figures 5
㉒ and 6 at pages 109 to 110) in attempted explanation. What these diagrams (Diagrams A and B) show, taken on the basis of Malta's own explanations and as conceded by paragraph 245 itself, is that the distance between the coasts (the factor *h*) is not an element in the result. So in just what way distance is regarded by Malta as a major geographical factor in the present case is left quite unclear. By contrast, it was shown in paragraph 7.26 of the Libyan Counter-Memorial that increasing the distance between coasts of unequal lengths has the effect of distorting the coastal relationships in the context of continental shelf delimitation by allocating to the State with the shorter coast a disproportionate, and hence inequitable, area of continental shelf. The Maltese pleadings fail to recognise or explain this fact, which is the true meaning of distance as a relevant

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[1] Malta's failure to deal seriously with either its coasts or those of Libya hardly comports with what the Court had to say about the importance of coasts in para. 73 of its 1982 Judgment. *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 61, para. 73.

[2] In a sense, however, an island enjoys a certain geographical advantage since, unlike a mainland State, it may claim maritime rights all around its territory.

circumstance in the present case and, thus, constitutes a major issue between the Parties[1].

5.12 With regard to the factor of size, Malta is understandably sensitive. If geography is not to be refashioned, however, the size of Malta and the size of Libya are undeniable facts relevant to the question of delimitation. Apparently, Malta does not grant any relevance to the factor of size whether in terms of coastal lengths or size of land territory or landmass. ⑰ Map 18 facing page 166 of the Libyan Counter-Memorial (which has been reproduced as *Map 8*, facing this page) demonstrates how unrealistic is the basis of Malta's claim. For the dotted portion of this Map represents what Malta regards as the area of natural prolongation of the land territory of Malta that overlaps the area of natural prolongation of the land territory of Libya. It will be seen that Malta regards the two natural prolongations as identical. But the coasts of Malta from which the lines project do not even face Libya, and the only Maltese coastal segment facing southeast toward the vast area of the Ionian Sea - Sirt Rise encompassed within the Maltese trapezium figure is a mere 5.4 kilometres in length. Can these areas really be said to constitute as to Malta "a prolongation or continuation of that territory, an extension of it under the sea", to use the words of the Court in its 1969 Judgment[2]? The contention expressed by the trapezium is totally incongruous — it defies common sense — and it does so because of the very small size of Malta compared to that of Libya. It surely would be — to borrow the phrase used in the Maltese Memorial — a "massive encroachment" on the natural prolongation of Libya seaward from its coast facing northward toward the Ionian Sea to grant this contention of Malta expressed by the trapezium figure.

5.13 As to Malta's reliance on basepoints rather than coastlines, Malta does not identify the basepoints upon which it relies. Quite aside from this oversight, it remains for Malta to demonstrate how basepoints reflect the coastal relationships of Libya and Malta and how, in themselves, they "generate" continental shelf rights[3]. Basepoints cannot be relied on to escape from an examination of actual coasts and coastal relationships. Natural prolongation of the land territory or landmass of a State starts from the coastline. In this respect, baselines or coastal fronts are relevant, not basepoints, for only the former reflect the length, shape and direction of the coasts.

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[1] The Court has recognised that the greater the distance from the coasts of a State the greater is the likelihood that equidistance can lead to an inequitable result. See *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 37, para. 59. This observation, made by the Court in the context of adjacent coasts, would apply, *mutatis mutandis*, in a situation of opposite relationship between coasts, particularly where there is, in addition, a major disproportion between the respective lengths of coasts.

[2] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 31, para. 43.

[3] See para. 4.36, above.

5.14 Another issue that has been avoided by Malta is the relevant area in the present case, a matter intimately connected with the question of the relevant coasts of the Parties[1]. The relationship of the relevant area to the element of proportionality is taken up in Chapter 7 below. Insofar as the physical factors of the present case are concerned, it may be deduced that Malta regards the relevant area in the present dispute to be the area of shelf between the two Parties underlying the Pelagian Sea in spite of Malta's claimed equidistance line extending far to the east into the Ionian Sea. A number of the scientific assertions in the Maltese Counter-Memorial can only be construed, even accepted on their own terms, as referring to the areas of shelf underlying the Pelagian Sea, and not to areas east of the edge of the Pelagian Block marked by the line of Escarpments and Fault Zone[2]. Certainly the Maltese assertion that the area is a "geological continuum" can have been intended to refer only to the areas of sea-bed and subsoil south of the Rift Zone underlying the Pelagian Sea.

### B. Sea-Bed and Subsoil Features and Characteristics

5.15 The Maltese pleadings appear to contain an internal contradiction regarding the relevant areas of sea-bed and subsoil. On the one hand, they have tried to play down the Rift Zone in order to sustain the claim that the entire shelf area between Malta and Libya is a "geological continuum". On the other hand, the technical notes appearing in Annex 2 of the Maltese Counter-Memorial prepared by Malta's scientific advisers refute any notion of a "continuum". The existence of the Rift Zone is confirmed by these papers, although it is given a different name — "The Central Trough and Ridge System" — and efforts to point up the importance of features to the south of the Rift Zone, both in the sea-bed and the subsoil, can hardly be regarded as consistent with any "continuum" theory.

5.16 Not surprisingly, the two technical notes incorporated in the Maltese Counter-Memorial reveal that the scientists on both sides are to a large extent in agreement. However, the Maltese Counter-Memorial also contains the kind of misstatement of Libya's position that requires comment in this Reply.

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[1] The subject of the relevant area was dealt with in Chapter 10 of the *Libyan Memorial* (paras. 10.12-10.18).

[2] This conclusion appears from the scientific notes annexed to the *Maltese Counter-Memorial* where the emphasis has been placed almost exclusively on the geomorphology and geology of areas of shelf underlying the Pelagian Sea as seen not only from the titles of the notes themselves but also from such figures as Figure 1, Figure 8 and Figure 19. It is also confirmed by Professor Vanney's emphasis in his technical note on the "structural unity" of the Pelagian Block and his contrasting description of the Ionian Basin to the east (Annex 2, p. 18). Figure 3 of Annex 2 of the *Maltese Counter-Memorial* is focussed solely on the features underlying the Pelagian Sea. See, in this connection, *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 41, para. 32.

5.17 In considering the paragraphs which follow, three general observations should be borne in mind:

*First*, as observed above, there are few substantive differences among the scientists as to the physical features of the sea-bed and subsoil. The few that do exist — including a number of serious errors and misleading impressions contained in the Maltese Counter-Memorial — will, however, be mentioned below.

*Second*, there is a lack of conformity between a number of statements made in Volume I of the Maltese Counter-Memorial and the technical notes included in Volume II, Annex 2, thereto.

*Third*, the main points regarding the physical facts of relevance in the present case are based on easily understood and readily observable data: they are not controversial and are well accepted within the scientific community. This is borne out by Malta's own scientific evidence.

5.18 The two major features of special relevance to the present case are the Rift Zone, which cuts across the relevant area of continental shelf lying between Libya and Malta, and the Escarpments-Fault Zone which limits this area in the east. The physical characteristics of the sea-bed and subsoil within the area of continental shelf of relevance to the present case will be discussed below in relation to these two features.

## 1. The Rift Zone

### *Its Existence Recognised by Both Parties*

5.19 The principal point about the Rift Zone that has emerged from the pleadings of the Parties to date is that its physical existence is acknowledged by both Parties. (Of course, as noted in Chapter 3 above, Malta questions its legal relevance.)

5.20 The Rift Zone is referred to in several parts of Volume I of the Maltese Counter-Memorial and is discussed in some detail in the two technical notes found in Annex 2 to that pleading. Figures 1 and 3 at pages 16 and 20 of that Annex accurately depict the Rift Zone area as extending all the way east to the Heron Valley which separates the Sicily-Malta Escarpment from the Medina Escarpment[1]. As the following paragraphs will show, the Maltese Counter-Memorial itself and its annexed technical notes refute the statement in paragraph 5 of the Maltese Counter-Memorial that "Malta will demonstrate in the course of this Counter-Memorial that in fact the so-called 'Rift Zone' does not show the characteristics of a radical physical separation between the natural prolongations of the two countries . . . ".

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[1] See *Libyan Memorial*, paras. 3.14 and 3.50.

5.21 Libya has demonstrated in its Memorial and Counter-Memorial that the Rift Zone constitutes a fundamental discontinuity in the areas of continental shelf lying between Libya and Malta relevant to the present dispute. The notes included in the Technical Annex to the Libyan Memorial (Volume I) amply support this conclusion. It is supported as well in recent scientific literature, a number of examples of which are noted below[1]. Apart from Figures 1 and 3 at pages 16 and 20 of Annex 2 to the Maltese Counter-Memorial, which clearly illustrate the sea-bed manifestations (or geomorphology) of the Rift Zone, the three seismic profiles (Figures 4, 5 and 6) found at pages 22, 24 and 25 of this same technical note equally clearly reveal the subsoil manifestations (or geology) of the Rift Zone. These are the same seismic lines that appear as Figure 7, Part II, of the Technical Annex to the Libyan Memorial. They were prepared by Professor Finetti who explained their relevance in the following terms:

> "The particular area between Sicily and Libya presently corresponding to the area of major *grabens* (Malta, Linosa, Pantelleria and Medina) — the Sicily Channel — consisted of a substantially flat, unfractured and undeformed Paleocene-Eocene-Oligocene-Miocene cover. Then an extensive rifting process started to occur during the Neogene- Quaternary stretching phase (about 15 million years ago), a process which continues today. It produced a remarkable deformation of the above-mentioned area along the rift zone.
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> "Intense faulting, collapse and uplifting of blocks, tilting and igneous extrusion (and intrusion) *i.e.*, volcanic activity, were the

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[1] ILLIES, J.H., "Graben Formation - The Maltese Islands - A Case History", *Tectonophysics* 73, 1981, pp. 151-168; FINETTI, I.R., "Geophysical Study of the Sicily Channel Rift Zone", 1984, *Boll. Geof. Teor. Appl.*, Vol. 26, No. 101; AKAL, T., "The General Geophysics and Geology of the Strait of Sicily", 1972, *Oceanography of the Strait of Sicily*, T.D. ALLAN, T. AKAL AND R. MOLCARD (eds.), Saclant ASW Research Center, La Spezia, Conf. Proc., Vol. 7, pp. 177-192. A copy of the recently published Finetti paper has been furnished to the Registry. The paper contains some material and technical analysis related, in part, to work done by Professor Finetti as scientific adviser to Libya in connection with the present case. It will be referred to hereinafter as FINETTI, I.R., (1984). See also JONGSMA, D., VAN HINTE, J.E., and WOODSIDE, J.M., "Geologic Structure and Neotectonics of the North African Continental Margin South of Sicily", a paper submitted for publication on 18 June 1984 to *Marine and Petroleum Geology*. A draft of this paper has been furnished to the Registry and references in this Reply are to this draft of the paper. The authors of this paper have also served as scientific advisers to Libya in connection with the present case and their paper contains some data stemming from this work. (See Introduction to the Technical Annex to the *Libyan Memorial*.) This paper will be referred to hereinafter as JONGSMA, D., *et al.*, (1984).

> main geological results of this rifting process. The general dominating trend of rifting was northwest/southeast. With a few exceptions, all main geomorphological structures of the Sicily Channel were generated during this extensional process[1].
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> "The Islands of Malta, in particular, appeared at this time as a small area of the uplifted block at the north flank of the Malta Graben . . .
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> "Between Malta and the Medina Bank there exists, with no interruption whatsoever, what is the continuation to the east of the Pantelleria-Malta-Linosa Rift Zone (the Sicily Channel). I refer here to the major rift area, the Medina Graben, which geomorphologically is expressed by the two channels running between Malta and the Medina Bank (sometimes referred to as the Malta and the Medina Channels) . . .[2]".

5.22 Portions of this technical paper are quoted above since both Professor Vanney and Professor Mascle relied heavily on the data published by its author in their technical papers annexed to the Maltese Counter-Memorial. However, these data have been used quite selectively in Malta's pleading. For example, the part of the seismic profile along the line MS-14, which shows the Medina *graben* and which illustrates so well the continuation of the Rift Zone in the area of the Medina Channel lying between Malta and the Medina Bank, was not shown by Malta[3]. (The seismic profile has been placed in *Annex 5* hereto, together with the same profile as depicted in Figure 7 of Finetti (1984). Another profile taken from Jongsma, *et al.* (1984) is also included in this *Annex.*) These seismic profiles demonstrate the continuity of the Rift Zone along the Malta and Medina Channels out to the Ionian Sea. The omission of the Medina *graben* profile from the Maltese Counter-Memorial made it easier for Malta to make the kind of comment found in paragraph 45 of its Counter-Memorial, quoted below:

> "Libya is evidently troubled by the shallowness of these two Channels [referring to the Malta and Medina Channels], compared with that of the Troughs further to the west, as is shown by the embarrassed explanations which the Libyan Memorial gives for Libya's view that these two Channels constitute 'eastward extensions' of the Troughs."

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[1] The term "Sicily Channel" is used in this paper in its broader sense to encompass this whole area of rifting and faulting which Libya refers to in its pleadings as the "Rift Zone."

[2] *Libyan Memorial*, Technical Annex III, pp. 2-3.

[3] Figure No. 2, Part II, of the Technical Annex to the *Libyan Memorial*. See also Figure No. 1, Part III of the same Technical Annex.

5.23 Professor Vanney, in his technical note, demonstrated exactly this continuity between the Troughs and the Channels, even though he substituted the term "The Central Trough and Ridge System" for "Rift Zone"[1]. This is graphically demonstrated by ***Map 9***, which consists of a bathymetric map with the Rift Zone shaded in. Professor Vanney's Central Trough and Ridge System has been superimposed on ***Map 9***, revealing that the Rift Zone is entirely encompassed within the "System" of Professor Vanney. Since Figure 3 of Professor Vanney's paper concerns itself with the sea-bed and not the subsoil, that is, with geomorphology and not geology, his choice of terminology is quite understandable. While observing that "The Central Trough and Ridge System" does not comprise a single long trough with a flat bottom similar to the Hurd Deep or the Norwegian Trough — an indisputably correct statement — Professor Vanney goes on to say that "[a]ll this complex morphology is the most remarkable expression of the distensive forces acting since Miocene times (10 million years ago)[2]". This accords entirely with such statements appearing in the 1984 Finetti paper as —

> ". . . cutting across the sea-bed of the Pelagian Sea from the Egadi Valley to the Heron Valley are the huge troughs of Pantelleria, Linosa and Malta and the Medina and Malta Channels. The ensemble of these troughs and channels constitutes a distinct and unique geomorphological province that, with differing widths and varying water depths, crosses with continuity the entire Pelagian Sea[3]."

The introduction to this paper further states that—

> ". . . it has become clear that this area has been affected by a prominent rifting process which remarkably deformed the previously existing quiet tectonic conditions. More detailed observations revealed that this tectonic fragmentation is due to a young geodynamic process, still active[3]."

5.24 In paragraph 18 of the Vanney paper, the volcanism along this System is also mentioned[4]. In fact, this paper at paragraph 11, page 23, clearly connects up the deeper troughs and shallower channels as part of the same system which, to quote from this paragraph of the paper, " . . . contains the major Malta, Pantelleria and Linosa Troughs with intervening ridges and the smaller Malta and Medina Channels". In the light of these observations, there can scarcely be any question as to the existence of a major discontinuity in the sea-bed between Libya and Malta, whether it is called the "Rift Zone" or "The Central Trough and Ridge System", a discontinuity that includes the Troughs and Channels extending east to the Heron Valley.

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[1] *Maltese Counter-Memorial*, Vol. II, Annex 2, Figure 3 at p. 20.

[2] *Ibid.*, Vol. II, Annex 2, para. 18. "Distensive" is another term for rifting or pull-apart.

[3] FINETTI, I. R., (1984), *op. cit.*, p. 3. A copy of this page is attached as *Annex 7*, hereto.

[4] The paper is surprisingly silent as to the intense magnetic anomalies indicating volcanic activity between Malta and the Medina Bank, important evidence of the continuation of the Rift Zone across the Medina and Malta Channels to the Heron Valley. See FINETTI, I.R., (1984), *op. cit.*; see ZARUDZKI, E.F.K., "Submarine Volcanoes in the Strait of Sicily", *Rapp. Comm. Int. Mer Médit.*, 24, pp. 233-234 (1977). The volcanism within the Rift Zone, including the Malta and Medina Channels, is also discussed in JONGSMA, D., *et al.*, (1984), *op. cit.*, pp. 11-13. This paper notes the absence of recent volcanism in the southern area of the Pelagian Sea.

5.25 It is surprising, therefore, to find the main body of the Maltese Counter-Memorial taking a different view of the Rift Zone. The principal discussion of the Rift Zone in the Maltese Counter-Memorial itself appears in paragraphs 41 through 58. These paragraphs — devoted to criticizing the use of the term "Rift Zone", to describing its complexity, and to a criticism of Libya's failure to identify its exact starting point — do not seem to be of particular significance. A feature of this size, involving pull-apart and shearing motions, is necessarily diffuse. It could be identified by many names, but as the Libyan Counter-Memorial brought out, the term "Rift Zone " is commonly used for features of this kind[1]. It will be seen that the technical note of Professor Vanney is full of descriptive terms which point out the significance of the Rift Zone: he refers to "recent faulting", to an area "cut by discontinuous indentations", and to the "steepness and height" of the troughs (all at page 26 of Annex 2). Such statements hardly validate the introductory statement in paragraph 5 of the Maltese Counter-Memorial that "the so-called 'Rift Zone' does not show the characteristics of a radical physical separation between the natural prolongations of the two countries . . .".

5.26 Paragraph 46 of the Maltese Counter-Memorial asserts that the "striking weakness" regarding the Rift Zone is that its major features do not lie between Libya and Malta. Yet this point is not borne out by Malta's own annexed technical paper of Professor Vanney. In fact, Figure 1 at page 16 of that paper (which has been reproduced as *Figure 1* facing the following page) shows the Malta Trough to extend to the south of all of Gozo and most of the southwest-facing coast of Malta and, thus, to lie between these coasts and the coast of Libya. The Malta Trough is clearly not located "beyond the western limits of the 'relevant area' as seen by Libya itself[2]". The extent of the Malta Trough is also shown on the sketched bathymetric map appearing as Figure 8 at page 28 of Malta's Technical Annex where this deep feature is shown to cross in front of most of the Maltese Islands. The legend to this sketch describes the Malta Trough as being "closed South of the island of Malta . . .". But, in any event, this is not really the point, as was carefully explained and illustrated by a diagram in the Libyan Memorial[1] as well as in the Libyan Counter-Memorial[2]. It is to be expected that there will be geomorphological variations along a Rift Zone of these proportions in which pull-apart (rifting) and strike/slip (shearing) movements are occurring in the subsoil. The form which these features take on the sea-bed has a direct correlation with such variations in subsoil movements. As described in a very recent scientific paper:

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[1] See *Libyan Counter-Memorial*, fn. 1 at p. 52.

[2] *Maltese Counter-Memorial*, para. 46.

> "After the Messinian a rift and dextral shear zone established itself across the African Margin from the Strait of Sicily [used in the sense of that narrow body of water lying between Cape Bon in Tunisia and the opposite Sicilian coast] to the Medina Ridge in the Ionian Basin. The zone is marked by up to 1.7 km deep grabens, narrow active wrench faulted channels, volcanic fissures and local uplifted 'Keilhorsts' such as Malta[3]."

A particularly lucid account of the faulting in this zone appears in the same paper:

> "The pattern of faulting derived from tracing active faults in seismic profiles across this zone, shows all three general styles of faulting which have been recognized to be associated with wrenching [citing Wilcox, *et al.*, (1973)]. In the area of the Pantelleria, Linosa and Malta Troughs, divergent wrenching is seen resulting in deep grabens perpendicular to the main tensional axis of the strain ellipse. The zone narrows between the Malta Plateau and Medina Bank and the style is simple parallel wrenching producing uplift of 'keilhorsts' such as Malta . . . The eastern part of the wrench zone in the Ionian Sea, the Medina Ridge is typical of convergent wrenching . . .[4]."

5.27 A technical study[5] of the gravity anomaly data[6] along the Rift Zone bears out the fact of the continuity of the Rift Zone from the Egadi Valley between Sicily and Tunisia in the northwest to the Heron Valley
㉗ dividing the Sicily-Malta and the Medina Escarpments. *Map 10* shows a red line running down the Rift Zone. It represents the axial ridge of the

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[1] See *Libyan Memorial*, para. 3.20, Fig. 2, and Part II of the Technical Annex.

[2] See *Libyan Counter-Memorial*, paras. 2.75-2.76.

[3] JONGSMA, D., *et al.*, (1984), *op. cit.*, p. 1, attached as *Annex 6*, hereto.

[4] *Ibid.*, p. 14, attached as *Annex 6*, hereto.

[5] FINETTI, I.R., (1984), *op. cit.*

[6] Gravity anomalies are used to trace geological structures since they indicate excess or deficiency of mass at depth. A gravity anomaly is the difference between the local value of gravity and that to be expected in the absence of geological variations but allowing for latitude and elevation. See also BATES, R.L. AND JACKSON, J.A. (Eds.), *Glossary of Geology*, second edition, American Geological Institute, Falls Church, Virginia, 1980.

Rift Zone where the crust has been stretched to its thinnest point[1]. The data from which this line has been obtained appears in *Annex 7* hereto, which is page 18 of this technical study and includes a residual gravity map of the Pelagian Sea on which this line appears. This technical study also makes a comparison between the Rift Zone and the Red Sea Rift Zone, where similar geomorphological variations are found. The Figure, also appearing at *Annex 7*, illustrates this comparison. Aside from similarities in respect to crustal thinning, it is also of interest that the Gulf of Aqaba and the Dead Sea are part of the same Red Sea Rift Zone; yet geomorphologically they are areas which are considerably less pronounced in depth than other parts of the Red Sea Rift Zone. This is the result of strike-slip or shearing rather than pull-apart or rifting motions in the subsoil, a factor common to both Rift Zones[2]. Thus, when the movements occurring in the subsoil are examined — as seen, for example, from seismic profiles of the Medina *graben*[3], whose sea-bed manifestation is the Medina Channel lying between Malta and the Medina Bank — it is evident that deep rifting down to the upper mantle is occurring, with resulting volcanism. It is, thus, the Rift Zone as a whole which is the significant feature regardless of the variation in geomorphological expression normal in parts of such a Rift Zone.

5.28 The simple diagram used by Libya to explain the foregoing (Figure 2 of the Libyan Memorial) was apparently mistaken by Malta as some kind of theoretical model. This is revealed by the rather imaginative discussion of rotational theory for the origins and nature of the Rift Zone in the technical paper of Professor Mascle. Libya has seen nothing in that aspect of the technical discussion of relevance to the present case that it need take issue with. The Rift Zone — its rifting and shearing in the subsoil, and its sea-bed features — is based on scientific data, not on mere theory. It does not seem necessary, therefore, to introduce a complex and controversial subject such as "rotation" into the discussion of plainly evident features. The data put forward in the Libyan pleadings are readily available and do not depend on models. These data are not difficult for the non-expert to understand, unlike complex and questionable theories of

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[1] See para. 6.20, below, and fn. 2 at p. 83, below, for a further discussion of this point of maximum thinness.

[2] ILLIES, J.H., (1981), *op. cit.*; SCHICK, R., "Seismotectonic Survey of the Central Mediterranean", *Inter-Union Commission on Geodynamics, Scientific Reports*, H. CLOSS, D. ROEDER, K. SCHMIDT (eds.), Stuttgart, 1978; JONGSMA, D., *et al.*, (1984), *op. cit.*, p. 1 and p. 3, where "wrench faulting" in the Medina-Malta Channel is noted as well as thicknesses of more than 800 metres of post-Messinian sediments within the *grabens* formed by this wrenching, indicating rapid filling. See FINETTI, I. R., (1984), *op. cit.*, p. 20. Strike-slip or shearing motions in both the Rift Zone and the Red Sea Rift Zone are said by Professor Finetti to account for "reduced pull-apart movements"; this factor accounts for the more moderate geomorphological manifestations in certain areas of the Rift Zones in both instances. See also JONGSMA, D., *et al.*, (1984), *op. cit.*, pp. 10-11.

[3] See para. 5.22, above, and fn. 4 at p. 63, above. See *Annex 5*, hereto.

"rotation" that neither confirm nor deny the presence of actual physical features. It is Libya's belief, confirmed by scientific papers and even by Malta's own experts, that the essential elements of fact which establish the Rift Zone are clear and uncontroversial.

5.29 In short, the evidence put forward by the pleadings of both Parties establishes the existence and importance of the Rift Zone. This evidence shows that it cannot be regarded as other than a fundamental discontinuity in the sea-bed and subsoil in areas of shelf lying between Libya and Malta. To characterise this area of shelf as a "geological continuum" is at odds with the scientific evidence put forward by both Parties to the present case.

### *Points Requiring Clarification or Correction*

5.30 It is now necessary to turn to certain specific technical points to be found in the Maltese Counter-Memorial requiring correction or clarification. One example is found in Professor Mascle's paper at paragraph 60 — where an attempt is made to emphasise the faulting in the southern area of the Pelagian Sea in order to refute statements to the contrary in the Libyan Memorial. This conclusion is based on a seismic profile along MS-19 (Figure 24 at page 55 of Professor Mascle's paper). However, a serious error regarding the location of the Jerrafa Trough has been made. What is identified on Figure 24 as the Jerrafa Trough is not that feature at all, which in fact lies some 30 nautical miles to the south — well below the 35°N parallel[1]. The Jerrafa Trough is a relatively minor feature of the sea-bed and subsoil and does not at all resemble the faulting shown in Figure 24[2]. Rather than disproving Libya's case regarding the considerably greater faulting north of the 35°N parallel than south of it, Figure 24 of Professor Mascle's paper implies the contrary.

5.31 The Maltese Counter-Memorial has sought to attack Libya's scientific data in other ways which are erroneous and deserve mention. It has sought to portray inconsistencies between Libya's position regarding the physical facts in the present case and in the *Tunisia/Libya* case. One example concerns the definition of the Pelagian Block. Libya had thought that this matter had been completely dealt with in Part I of the Technical Annex to the Libyan Memorial. However, paragraphs 49 and 50 of the Maltese Counter-Memorial seem intent on trying to show some difference between the Libyan Memorial and Professor Fabricius, who preferred in his paper in Part I of the Technical Annex to refer to a northern and southern unit divided by the Rift Zone — a minor matter of terminology.

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[1] The feature erroneously identified in the Maltese Technical Annex as the Jerrafa Trough has been given the name Lampedusa Trough in Finetti, I.R., (1984), *op. cit.*

[2] See the Figure which appears in *Annex 8* to this Reply, where comparisons are made to show how much more significant geomorphologically the Medina Channel is than the Jerrafa Trough. See also Finetti, I.R., (1984), *op. cit.*, p. 9.

Malta also suggests that, whereas in the *Tunisia/Libya* case Libya found no geomorphological features of relevance to delimitation in the Pelagian Block, in the present case Libya has "discovered" the Rift Zone and, with it, the importance of geomorphology.

5.32 It is clear that the delimitation in the *Tunisia/Libya* case did not involve the area of the Rift Zone but rather the area lying to its south. There were no features in the *Tunisia/Libya* case on the sea-bed or in the subsoil in that southern area which in the least resemble the features of the Rift Zone in the present case[1]. The two cases are markedly different in this respect.

5.33 Malta has also sought to play down the significance of the Rift Zone by attempting to highlight other geomorphological and geological characteristics of the continental shelf underlying the Pelagian Sea. Many of these features, such as the Tripolitanian Valley, fall well outside any area of shelf claimed by Malta in the present case; their relevance, therefore, is quite different from that of the Rift Zone, which runs right through the area of dispute. However, as features underlying the relevant area of the Pelagian Sea in the present case they undoubtedly have a closer connection to the case than such more remote features, mentioned in several places in the Maltese Counter-Memorial, as the Hurd Deep, the Norwegian Trough, the Timor Trough or the Okinawa Trough. Of course, the Rift Zone is quite different from each of these features. The Libyan Memorial discussed in some detail the Hurd Deep and the Norwegian Trough, as well as the Tripolitanian Valley, showing how they were hardly comparable to the Rift Zone[2].

5.34 With regard to such pronounced features as the Timor Trough and the Okinawa Trough, although they might well be regarded as discontinuities of significance in any delimitation (and the Timor Trough did play an important role in the delimitation agreement between Australia and Indonesia[3]), to try to compare their physical forms with those of the Rift Zone is like comparing apples with oranges. Nor does the fact that the Rift Zone is not a unified trough have the significance implied by paragraph 44 of the Maltese Counter-Memorial. There is no doubt at all, in spite of the diversity of its features, that geomorphologically, geologically and oceanographically[1] the Rift Zone forms a connecting link between the Western Mediterranean and the Ionian Sea. Thus, paragraph 44 of the Maltese Counter-Memorial which claims that the Rift Zone is not a "major feature" cannot be taken as a serious comment on the Rift Zone, which contains troughs descending to depths exceeding 1,700 metres; which extends for some 300 nautical miles from the Egadi Valley between Tunisia and Sicily to the Heron Valley separating the Sicily-Malta Escarpment from the Medina Escarpment at the eastern edge of the Pelagian Sea; which is between 15 and 50 nautical miles in width; which in its subsoil contains deep ruptures descending down to the upper mantle of the earth; and along which young volcanism is found, attesting to the depth and activeness of the rifting throughout its extent.

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[1] The Ride de Zira and the Ride de Zuara, for example, can hardly be compared to the features of the Rift Zone. The Ride de Zira rises no more than 25 metres above the sea floor over a length of 41 km and a width of 7.5 km. Hence, it is a barely discernable sea-bed feature. The Ride de Zuara rises only between 5 and 10 metres above the sea floor. These features are the result of salt doming rather than the pull-apart, rifting and shearing that created the *grabens* of the Rift Zone.

[2] See the *Libyan Memorial*, paras. 6.45-6.51 and 8.06-8.08; fn. 2 at p. 99; and fn. 1 at p. 100.

[3] See para. 6.48 of the *Libyan Memorial*; and paras. 5.74-5.75 and Annex of delimitation agreements, No. 24, to the *Libyan Counter-Memorial*.

### *The Area South of the Rift Zone*

5.35 As for the southern "valleys", including the Tripolitanian Valley, which are introduced in the Maltese Counter-Memorial in an attempt to play down the significance of the Rift Zone, they may well be located over ancient, inactive faults. The important fact, however, is that their present-day sea-bed expression is gentle[2] and the direct result of erosional and depositional factors[3]. They are heavily blanketed by thick columns of sediment. It is the present-day characteristics of these areas—not the past—which is of interest. The fact is that there is no active rifting revealed by young volcanism here and, consequently, little sea-bed expression, quite unlike the Rift Zone. There is no evidence of any rift network that may be separating the African plate as in the case of the Rift Zone[4]. In fact, the Reduced Map No. 1 at page 72 of the Maltese Counter-Memorial showing "major structural features" of the North Sea might be compared with the situation in the southern part of the Pelagian Sea. For the North Sea has a shallow, featureless sea-bed that may be likened to the seafloor of the southern part of the Pelagian Sea: although there may be ancient underlying structures of geological interest, the sea-beds themselves are not today the direct reflection of these structures. There is no fundamental discontinuity reflected in the sea-bed of either the North Sea or the area underlying the Pelagian Sea south of the Rift Zone. When Professor Vanney speaks of the "structural unity" of the Pelagian Block, he is quite accurately describing the shelf area lying south of the Rift Zone[1].

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[1] The oceanographic connection between the eastern and western Mediterranean formed by the Rift Zone is mentioned (with references) in JONGSMA, D., *et al.*, (1984), *op. cit.*, p. 2.

[2] There is an obvious error at p. 33 of Vol. II, Annex 2, of the *Maltese Counter-Memorial* where the gradient of the slopes of the Tripolitanian Valley is said to surpass 40 and even 50:100. What is clearly intended is 40 or 50:1000, a rather gentle slope. Measurements of gradients taken from several directions in this Valley may be found in Part I of the Technical Annex to the *Libyan Memorial*.

[3] To quote from JONGSMA, D., *et al.*, (1984), *op. cit.*, p. 11: "To the south of 35°N over the Jarrafa Trough and Tripolitania Basin the contours reflect the erosional effects of a river system at the end of the Messinian." A copy of this page is attached as *Annex 6*, hereto.

[4] See para. 5.43, below.

5.36 A quite misleading impression is created by the "bathymetric profiles" which appear as Figure 2 at page 19 of Annex 2 of the Maltese Counter-Memorial and as Figures 1 and 2 at pages 27 and 28 of the Maltese Counter-Memorial. One of these profiles appears to have been carefully selected to cross the Medina Channel in a particularly shallow area and to cross the southern "valleys" at their deepest points. The latter are deep because the southern sections of the Pelagian Block very gradually deepen toward the area of the Sirt Rise-Ionian Sea. What is not revealed are the steep flanks of the southern part of the Medina Channel where it passes along the Medina Bank dividing it from the Ragusa-Malta Plateau. Bathymetric profiles to be of informative value should be drawn perpendicular to the features being measured — which, since they trend in this area roughly north-northwest/south-southeast, would be profiles running out from the Libyan coast at approximately 26°. The Figures contained in *Annex 9* hereto show two profiles drawn in this manner: the first profile passes between the Islands of Gozo and Malta; the second falls just to the east of the Island of Malta. They give quite a different impression from that in the Maltese account and, being constructed perpendicular to the features, they have a more scientific basis. The same *Annex 9* also contains profiles that follow the western segment of the Maltese trapezium from Ras Ajdir to Gozo and its eastern leg as far as its intersection with the proposed Maltese median line. These profiles illustrate how completely Malta has ignored the geomorphology of the sea-bed in its proposed result. However, it does not seem necessary to resort to the drawing of profiles any more than to rely on abstract constructs or models to illustrate what plainly appears from a bathymetric map of the area regarding the nature of the sea-bed of interest in the present case.

5.37 The only point that emerges from this discussion, whatever the language employed or the illustrations used, is that the southern portion of the Pelagian sea-bed becomes deeper toward the east. In this sense, depth *per se* does not create a discontinuity. There is no network or zone of rifting here that can be compared in any way with the Rift Zone. The legends on Figures 1 and 2 of the Maltese Counter-Memorial and referred to above — to the effect that the Misurata and Tripolitanian Valleys are "established on old, partly buried grabens" — is incorrect. The "valleys" are merely a general reflection of old *grabens* (over 90 million years old) underlying this region. The "valleys" themselves were formed by other, much more recent factors such as erosion and deposition. Moreover (and more importantly), the *grabens* are heavily blanketed by thick sediments[1] — they are not "partly buried grabens". The general smoothness and lack of steep gradient of this whole area of the sea-bed underlying the southern Pelagian Sea was fully detailed in the Libyan Memorial[2] in both a north/south and an east/west direction, and has not been controverted. The Maltese Counter-Memorial fails completely in this respect — the most it shows is a mere deepening of this portion of the sea-bed to the east[3].

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[1] See *Maltese Counter-Memorial*, Vol. II, Annex 2, p. 18.

5.38 What stands out rather conspicuously from Malta's effort to play down the significance of the Rift Zone by emphasising geomorphological and geological features south of the Rift Zone is that it makes a shambles of the argument in the Maltese Memorial that the whole area is a "geological continuum". It might have been expected that this assertion would fade away in the Maltese Counter-Memorial but, to the contrary, it returns with full vigour. In Part IV, where Malta's case is restated, it is again asserted at paragraph 270(a) that:

> "The seabed between Malta and Libya is a geological continuum consisting of the Pelagian Block and thus the shelf in the relevant area is characterised by its essential geological and geomorphological continuity[4]."

As the foregoing paragraphs have made clear, however, this is simply not the case. Even the descriptions found in the scientific papers annexed to the Maltese Counter-Memorial contradict any notion of a geomorphological or geological "continuum" in the relevant area[5].

### 2. The Escarpments-Fault Zone

5.39 Less need be said about this feature at this stage of the written pleadings. It was amply discussed in the Libyan Memorial and Counter-Memorial. Neither the Maltese Counter-Memorial nor its two technical notes attempt to deny its existence and importance on the factual plane. Professor Vanney even describes this feature as "one of the most remarkable in the Mediterranean because of its length (more than 700 km) and its height (difference in level between 1 to 3 km)[1]". The technical paper of Professor Mascle, since his interest is focussed on the sea-bed between Malta and Libya from which he apparently excludes any area east of this line of escarpments and fault zone, does not expressly deal with this ㉔ feature at all. However, Figure 19 at page 50 of his paper portrays the two Escarpments in very clear, graphic form running southward to a point at about 15° E longitude and 33° N latitude[2].

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[1] FINETTI, I. R., "Structure, Stratigraphy and Evolution of Pelagian and Ionian Seas", *Bol Geof. Teor. Appl.*, Vol. 24, No. 96, 1982, pp. 247-312; JONGSMA, D., *et al.*, (1984), *op. cit.*, p. 13.

[2] See *Libyan Memorial*, Technical Annex, Part I.

[3] The implication in para. 56 of the *Maltese Counter-Memorial* that the Court in paras. 66 and 80, pp. 57 and 64, of its 1982 Judgment made an assessment as to the relevance of the "Tripolitanian Furrow" which Libya is now disregarding in the present case is incorrect. This feature was merely noted as the only possible one that might have relevance when compared with such trivial sea-bed features as the Ride de Zira and the Ride de Zuara, upon which Tunisia had placed so much emphasis.

[4] See para. 5.14, above, regarding Malta's apparent admission as to what is the relevant area in the present case.

[5] See paras. 5.15-5.29, above.

5.40 It must, therefore, be taken as admitted that the Parties are in agreement over the fact that the Escarpments-Fault Zone forming the eastern boundary of the Pelagian Block constitutes a fundamental break in the morphology of the sea-bed and subsoil. However, Malta makes two curious comments relating to this feature that require discussion.

*First*, Malta asserts in paragraph 60 of its Counter-Memorial that the importance attributed by Libya to the Escarpments-Fault Zone can be valid only if "the Escarpment — the existence of which cannot be denied — represents the eastern end of Malta's continental shelf". In paragraph 61, Malta then invokes the definition of the continental shelf in Article 76 of the 1982 Convention. But this again indicates a confusion between the concepts of entitlement and delimitation. For Libya does not say that the Escarpments-Fault Zone marks the limit of areas of national jurisdiction, beyond which lies the "area", the deep sea-bed[3]. The point is simply that the Escarpments-Fault Zone represents a fundamental change in the morphology of the sea-bed and subsoil, forming the edge of the continental shelf underlying the Pelagian Sea, often referred to as the "Pelagian Block". Accordingly, it constitutes a relevant factor of great importance to the present case.

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[1] *Maltese Counter-Memorial*, Vol. II, Annex 2, para. 29, p. 34. Other descriptive phrases used by Professor Vanney for these features are: its "remarkable extent"; its "edge . . . dips on the east to depths in the Ionian Basin which are exceptional for the Mediterranean"; the "rupture of the slope"; "diverse reliefs stagger down"; "erect slopes (often cut by a network of ravines or by several small valleys), crests . . . , peaks (in many cases volcanic), or deep basins" (all found at p. 18).

[2] This Figure in other respects is confusing, making no distinction between types of structural features and their ages. The suggestion that there is some "network" uniting all of these features conveys a very misleading impression. It is well-known and beyond question that the various features depicted, to the extent they exist at all, occurred at widely separated geological times and had quite different causes. (It is worth noting however, that Professor Mascle uses Libya's nomenclature for the "Ragusa-Malta Plateau".)

[3] See Part XI, Article 133, *et seq.*, of the 1982 United Nations Convention on the Law of the Sea. It is not the position of Libya that the continental margin, as this term is defined in paragraph 3 of Article 76, ends at this significant feature. In fact, Libya has never conceded that Malta's continental shelf rights extend this far to the east. The whole matter raised by Malta of whether the Ionian Sea is underlain by continental or oceanic crust or some intermediate form is, in the view of Libya, a scientific question of no relevance to the present case. See, in this regard, fn. 2 at p. 21, above.

*Second*, the analysis in the Maltese Counter-Memorial of the relevance and significance of the Escarpments-Fault Zone seems based on a fundamental confusion. For example, in paragraph 6 of the Maltese Counter-Memorial, the question is posed:

> "[W]hy should the descent into the depths of the Ionian sea limit the rights of Malta towards the east but not constitute any obstacle to the extension of the rights of Libya towards the north?"

Again, in paragraph 139, Malta speaks of Libyan claims to maritime rights that "skirt the Medina Escarpment towards the east". The complete — and most baffling — statement of Malta in this respect is found in paragraph 208 of the Maltese Counter-Memorial, quoted in part below:

> "Malta, we are repeatedly told, can have no rights extending beyond her limited 'natural prolongation' in the physical sense and, in particular, cannot have rights which project beyond the edge of the Sicily-Malta and the Medina Escarpments. Libya, however, does not regard itself as bound by these limitations but, so it argues, should be allowed to develop its claims right through this 'forbidden' area in order to establish a delimitation with 'third States'. Why is it, one is bound to ask, that considerations of geology, geomorphology and of the principle of natural prolongation which are so strenuously adduced as the basis of Libya's case against Malta, have no reciprocal applicability in relation to Libya's ambitious claims?"

A simple reference to a map will provide the answer. For a map shows the very long length of Libyan coast extending from the line of Escarpments and Fault Zone eastward across the southern limits of the entire area of the Sirt Rise-Ionian Sea, all the way to the Egyptian border[1]. The Escarpments-Fault Zone does not cut across and disrupt the natural prolongation northwards of the Libyan landmass from this length of coast as it does any Maltese prolongation to the east.

5.41 In this connection, one of the most misleading illustrations in the ㉓ entire Counter-Memorial of Malta appears as Figure 1 of Annex 2 at page 16. This has been reproduced as *Figure 1* facing page 65. The north/south dark blue line which marks the eastern edge of the Pelagian Sea formed by the line of Escarpments and Fault Zone is made to continue on to the east as if a similar structure blocked Libya's natural prolongation into the area beyond the Escarpments-Fault Zone. The legend makes matters worse by asserting that the isobaths underline major structures.

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[1] The Italian Application for Permission to Intervene in the present case and the subsequent Oral Hearings and Judgment of the Court did much to clarify the obvious relationship between the coasts of Italy and Libya in this area of continental shelf east of the Escarpments-Fault Zone.

There is no discontinuity lying off the coast of Libya in this area. The natural prolongation of the land territory of Libya northward in this area is illustrated in geological terms by the pull-out cross-section appearing as Figure 1 in the Libyan Counter-Memorial, a figure based on seismic and drilling data. Malta's claim, displayed by its trapezium figure, would, if allowed, be a clear violation of the principle of non-encroachment so often emphasised in Malta's pleadings — the encroachment in this case being on the natural prolongation of Libya seaward from its coast into areas of the Sirt Rise and Ionian Sea lying to the north of Libya, or on the natural prolongation of Italy to the south — areas which all lie outside the relevant area in the present case.

5.42 Thus, it stands out clearly from the pleadings of the Parties to date that, just as Malta seeks to avoid a serious analysis of the geographical facts, so also does it attempt to divert attention from the remarkable seabed and subsoil features that exist in the areas of continental shelf relevant to this dispute. In the view of Libya, the physical facts of geography, geomorphology and geology lie at the very heart of this delimitation of the continental shelf. They are not complex to understand and constitute relevant factors of prime significance that cannot be ignored in seeking an equitable result.

5.43 The significance of the Rift Zone is underscored by the fact that two of the most recent technical papers dealing with this geomorphological and geological phenomenon have reached the same conclusion: that a "microplate" may be in formation along the Rift Zone[1]. To quote from the first of these papers, referring to the results of the collision between the African and Eurasian plates:

> "This initiated the latest period of tectonic activity and broke the Pelagian area in a passive southern platform attached to Africa and a separate fractured mobile terrain north of the Tunisian Plateau and Medina Bank. The neotectonics north of 35° can be described by uplift of Sicily and dextral shearing of the east to southeast moving Sicilian-Calabrian block with respect to Africa. This movement, of what might be considered a microplate between the African and European plates, is similar to that of the Aegean microplate, both of which are apparently consuming from different directions what remains of the oceanic part of the Ionian Basin[2]."

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[1] These papers support the conclusion referred to in fn. 2 at p. 29 of the *Libyan Memorial*, citing DEWEY, *et al.*, (1973), whose figure illustrating this point appeared at Annex 12, thereto.

[2] JONGSMA, D., *et al.*, (1984), *op. cit.*, p. 15, as well as Fig. 1 of that paper. Minor spelling errors have been corrected in the above quotation. This page and Fig. 1 appear in *Annex 6*, hereto.

The second paper, after comparing the Rift Zone with that of the Red Sea, concluded as follows:

> "The rifting process in the [Rift Zone], though quite recent in comparison to the rifting in the Red Sea, for example, has already produced a huge fragmentation of the crust along the [Rift Zone] and a prominent Mantle uplifting and crustal thinning. Hence, it is possible to delineate the tectonic separation of a Sicilian microplate, which includes the Adventure Plateau and the Ragusa-Malta Plateau, from the African megaplate[1]".

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[1] FINETTI, I.R., (1984), *op. cit.*, p. 27. This page appears in *Annex* 7, hereto.

# CHAPTER 6

## REFLECTION OF THE FACTS AND RELEVANT CIRCUMSTANCES IN ORDER TO ACHIEVE AN EQUITABLE RESULT

6.01 The principal elements which point to a delimitation that is equitable under the particular circumstances of the present case can be found on a bathymetric map of the Central Mediterranean[1]. The various considerations introduced in the Maltese Memorial under such headings as Malta's political status, the absence of land-based energy sources, and Malta's status as an island developing State are extraneous and clearly not relevant to the question of delimitation[2]. Other factors, such as those relating to Malta's fishing activities and national security considerations, have also been shown to be lacking in substance[3].

6.02 The factors of particular relevance to delimitation in the present case are the physical factors in the sense that they relate to (i) the general geography of the setting in which the delimitation is to take place, including the presence of third States and third State delimitations in the area, (ii) the specific geographical factors of coasts, size and distance, and (iii) the characteristics of the sea-bed and subsoil that constitute the continental shelf. As to the subsoil, it is when these geological elements have affected the surface of the sea-bed that they acquire particular significance in pointing-up what, in fact, constitutes the natural prolongation of one State or the other and whether fundamental discontinuities exist[4]. As the Court said in its 1982 Judgment —

> "... just as it is the geographical configuration of the present-day coasts, so also it is the present-day sea-bed, which must be considered. It is the outcome, not the evolution in the long-distant past, which is of importance[5]."

(28) 6.03 *Map 11* displays the physical setting of this case and may be a useful guide to the paragraphs that follow. On it have been placed the delimitation lines according to the Italy-Tunisia Agreement of 1971, the Italy-Greece Agreement of 1977 and the Court's line in the *Tunisia/Libya* case as it appeared on illustrative Map No. 3 of the 1982 Judgment. The

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[1] Of course, the important factor of the conduct of the Parties is not reflected by a bathymetric chart. Its relevance to the present case is taken up in Chapter 2, above. See also paras. 1.04-1.27 of the *Libyan Counter-Memorial*.

[2] See, generally, Chapter 3 of the *Libyan Counter-Memorial* and paras. 4.49-4.51, above.

[3] *Ibid.*; Malta's reliance on the principle of equality of States has been dealt with in para. 4.47, above, and in the *Libyan Counter-Memorial* (paras. 4.03-4.08) where it was shown to be of no relevance in effecting a delimitation between the Parties.

[4] See *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 51, para. 95.

[5] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 54, para. 61.

Rift Zone is shown by a slight shading, and the key features of the Rift Zone have been labelled, as well as certain other features of particular interest in the present context.

### A. The General Setting

6.04 Reverting to the broader geographical and geomorphological ⑳ setting revealed by *Map 11*, certain points stand out. The distinct character of both the geographical situation and the characteristics of the sea-bed in question is immediately evident. Malta is seen to be a small island group, not located by itself in the middle of a vast ocean, but placed within a constricted sea bordered by mainland States with extensive coastlines and large land territories. It is also apparent that the lines formed by the Sicily-Malta Escarpment and the Medina Escarpment divide two very different areas of sea-bed: that underlying the Pelagian Sea, on the west, and that underlying the Ionian Sea, on the east. Focussing on the area under the Pelagian Sea, the Rift Zone may be seen to divide two other, clearly separable areas or units: to the north are the Maltese Islands and the shelf of the Ragusa-Malta Plateau, the latter appearing as a submarine extension of Sicily; to the south lies the shelf that extends from the Libyan shores through the Melita and Medina Banks up to the Medina Channel, which separates this southern area from the Ragusa-Malta Plateau. The eastern border of the banks is the Medina Escarpment. These banks run generally southwestward toward Libya and westward toward Tunisia. To the east, the sea-bed area underlying the Pelagian Sea is bounded in the north by the Sicily-Malta Escarpment and in the south by the Medina Escarpment[1].

6.05 With respect to the presence of third States in the region, the southernmost points of the Italy-Tunisia delimitation on the west and of the Italy-Greece delimitation on the east are of particular interest. If these points are connected, it is seen that this line would not substantially depart from a line running through the Rift Zone.

### B. Geographical Factors

6.06 An examination of the relationship of the coasts of the Parties reveals, *first*, that the Maltese Islands are very small in relation to the surrounding land territories and, *second*, that the general direction of most of their coasts does not run from west to east but rather from northwest to southeast, generally parallel to the coast of Sicily to the north and to the features of the Rift Zone to the south. The effect of this, particularly when this "tilt" is emphasised by Malta's official baselines[1], is that only short lengths of the coasts of the Maltese Islands can be said to face Libya directly. Only those south or southwestern facing coasts on the Islands of Gozo and Malta that were identified in the Libyan Memorial bear a relationship to the Libyan coast between Ras Ajdir and Ras Zarrouq, which, similarly, was identified as relevant for purposes of the present delimitation[2].

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[1] As *Map 11* shows, the Medina Escarpment extends south to approximately 33° 30′ N latitude. The dividing point of these Escarpments is the Rift Zone and its extension into the Heron Valley.

6.07 Of course, the Libyan coast extends along the entire southern flank of the Central Mediterranean. However, the portion of this coast lying east of Ras Zarrouq lies well outside the area relevant for purposes of the present delimitation as identified in paragraphs 10.12 through 10.18 of the Libyan Memorial. In theory, the tiny segment of Maltese coast facing southeastward (a coastal facade of only some 5.4 kilometres) might be said to face the Libyan coast in the vicinity of Benghazi, some 350 nautical miles away. In reality, these coasts bear no more relation to each other than do the coasts of Crete to the coasts of Tunisia. Aside from the considerable distance that separates the two coasts and the vast difference in size, the Libyan coast east of Ras Zarrouq abuts on a very different area of continental shelf lying east of the Escarpments-Fault Zone consisting of the Ionian Sea and Sirt Basin. Moreover, the small southeast-facing part of Malta's coast is dwarfed by the coasts of third States — in this case of Italy and Greece — which also extend into this area, and, as noted above, by the coast of Libya. This highlights the fact that delimitations in the Ionian Sea involve these larger mainland States, not Malta.

6.08 It follows that the only coasts of the Parties which can realistically be regarded as having a relationship to each other for purposes of the present delimitation are the Libyan coast between Ras Ajdir and Ras Zarrouq and, at the very most, the Maltese coasts between the westernmost point on Gozo and the easternmost point on the Island of Malta[3]. The lengths of these coasts stand in a ratio of between approximately 1:8 and 1:12 to each other[4]. When viewed in this context, the 1973 proposal of Libya — to which the Maltese Counter-Memorial devoted considerable attention — can readily be understood.

### C. Libya's 1973 Proposal

6.09 The manner in which the Maltese Counter-Memorial has mischaracterised Libya's 1973 proposal calls for some comment[5]. This proposal is attacked on three main grounds in the Maltese Counter-

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[1] These baselines were discussed in the *Libyan Counter-Memorial*, para. 2.35.

[2] *Libyan Memorial*, paras. 10.10-10.11.

[3] *Ibid.*, and see para. 6.06, above.

[4] *Libyan Memorial*, para. 10.11.

[5] The historical background to Libya's 1973 proposal has been fully set forth in Chapter 4 to the *Libyan Memorial*.

Memorial: it is said that it would be "the product not of a method of delimitation but of a system of apportionment based upon a concept of proportionality[1]"; thus, "[t]his line was in no way constructed by reference to Libya's now dominant concern to reflect its own 'natural prolongation'[2]"; this, in turn, is said to show that "Libya's case to-day is in principle quite different from Libya's case a decade ago[3]". The invalidity of these assertions may be seen if the 1973 proposal is examined for what it is and not for what Malta would claim it represents.

6.10 The 1973 proposal of Libya was geared to the physical setting of the area between Libya and Malta. It was arrived at by connecting points along the relevant coasts of the two Parties and dividing the resulting lines in the ratio of the respective lengths of the relevant coasts. These were regarded by Libya as approximately the lengths of coast described in
㉙ Section B above. The resulting line appears on *Map 12*.

6.11 In July 1972, Libya had, for the first time, been presented with a concrete proposal for delimitation by Malta. Examination of the Maltese median line quickly showed that the equidistance method could not lead to an equitable result in the circumstances of the case and was clearly disproportionate. As shown by the minutes of the meetings of April 1973[4], the approach taken by the Libyan side represented a method based on the facts characterising the situation that would be responsive, in particular, to two key questions: what coasts are relevant to the delimitation, and how can the very different characteristics of those coasts be reflected in the delimitation?

6.12 The answer given by the Libyan side to these questions — dividing the distance separating the coasts of the Parties in accordance with their relative lengths — is now attacked by Malta as reflecting "no known method of delimitation in accordance with law and [being] impressionistic and arbitrary, as befits an approach based on apportionment[5]". Such a conclusion seems to stem from the insistence in Malta's pleadings on the "normal" nature of the geographical setting. The fallacy in Malta's description of the geographical situation involved in the present case is that Malta apparently sees itself as if it were located alone in the middle of an ocean. It is not. It is located in a narrow sea with a number of much larger neighbours having far more extensive lengths of coast flanking the surrounding areas of continental shelf.

6.13 The 1973 Libyan proposal dealt with this particular situation —a small group of islands with only very short lengths of coast that could be said to face a much longer length of the mainland Libyan coast — in a fashion that would reflect these coastal differences. For this reason, it was not based on equidistance since that method fails to reflect, among other factors, the differences in coastal lengths between Libya and Malta[1]. Rather than being derived from a pre-ordained method as such, the 1973 proposal sought a way of achieving an equitable result in these circumstances. The technique employed assured that each kilometre of Maltese coast received approximately the same weight as each kilometre of Libyan coast, with the result that the differences in coastal lengths were taken into account and the distorting effects of equidistance, particularly given the distance between the coasts, were eliminated[2].

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[1] *Maltese Counter-Memorial*, para. 267.

[2] *Ibid.*, para. 182.

[3] *Ibid.*, para. 194.

[4] See *Libyan Memorial*, Annex 40.

[5] *Maltese Counter-Memorial*, para. 228.

6.14 In the light of these observations, it is interesting to turn to the Maltese assertion that:

> "Stripped of the detail, the Libyan position is based upon a highly abstract conception involving a partition of the seabed in accordance with a specialised version of the test of proportionality, which in effect becomes an independent criterion advanced as the basis for a claim to a just and equitable share[3]."

In fact, it is obvious that the Libyan approach of 1973 is not based on or derived from an apportionment of areas of continental shelf. An apportionment presupposes two operations: *first*, a measurement of the areas of continental shelf to be apportioned between the Parties; *second*, a partition of those areas to each Party in accordance with a set ratio. The method proposed by Libya involved neither of these steps. It involved the construction of a line by applying a ratio based on the difference in coastal lengths to the distance separating the coasts of one country from those of the other, and not a "sharing out" of areas.

6.15 Even were the Maltese assertion correct, it could be made with equal force about equidistance, the difference being that equidistance would represent an attempt to apportion the continental shelf between the countries involved in a 1:1 ratio[1], whatever their coastal lengths, whereas the Libyan proposal reflected the difference in coastal lengths. Which conception is the more "highly abstract": that of Malta, which dictates the automatic application of a method simply because it has been used elsewhere, and in spite of the fact that it leads to results divorced from the concrete circumstances of the case, or that of Libya, which assesses and balances those circumstances, and reflects them in the delimitation?

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[1] The question of the distorting effect which small islands may have on an equidistance line has always been a problem. How to remedy that effect in order to reach an equitable result must be answered within the framework of each particular situation. The diversity of possible methods which may be used to obviate such disproportionate results was illustrated by the 1977 *Anglo-French Arbitration* where two different approaches were used: an enclave solution around the Channel Islands and the use of half-effect with respect to the Scilly Islands. Examples of State practice also illustrate other methods of dealing with islands.

[2] During the April 1973 meetings, the Libyan delegation made the following point:

> "In replying to the example stated by the Maltese delegation concerning the determination of the dividing line by the equidistance method between the Island of Malta and Sicily the Libyan delegation stated that in this specific case both methods will give almost the same results, because of the fact that the portion of the coast line of Sicily Island nearly equal to the length of the Maltese coast facing Sicily." *Libyan Memorial*, Annex 40.

[3] *Maltese Counter-Memorial*, para. 222.

6.16 The second ground on which the 1973 Libyan proposal is attacked by Malta stems from what Malta sees as an inconsistency in the Libyan case. The 1973 line is said by Malta not to have been constructed by reference to what is "Libya's now dominant concern", natural prolongation.

6.17 Malta's assertion that the "proposal based upon the ratio of coastal lengths and the 'Rift Zone' boundary represent two distinct conceptions which cannot in legal terms be complementary since they lack a common basis[2]" is at the same time inexact and misleading. It is inexact in implying that there is no common basis between geographical factors, on the one hand, and geomorphological or geological ones, on the other. That common basis is the concept of natural prolongation, which cannot be reduced to either one or the other set of factors[3]. It is misleading in stating that these factors "cannot in legal terms be complementary", because this is creating a problem which does not exist. In the delimitation process, all the relevant facts and circumstances must be identified, examined, assessed and weighed in order to reach an equitable delimitation. Foremost among those facts and circumstances are those which concern the coasts of the Parties and the sea-bed and subsoil of the continental shelf itself in the area to be delimited. The question is not, therefore, to know whether the solution toward which an examination of the coastal relationships of the Parties and that toward which an examination of the sea-bed would lead are "complementary" in an abstract way; the question is whether those factors point towards the same solution and, if not, how much weight they must be given in relation to each other, within the framework of the particular delimitation in order to reach an equitable solution.

6.18 It is also impossible to accept Malta's contention that Libya's case has materially changed since 1973. Today, as ten years ago, Libya takes the view that "the solution should be fair and reasonable, taking fully into account the circumstances of the particular case[4]". In 1973, the

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(16) [1] See *Libyan Counter-Memorial*, Diagram A facing p. 160.

[2] *Maltese Counter-Memorial*, para. 269.

[3] See *Libyan Memorial*, para. 6.55, and *Libyan Counter-Memorial*, para. 4.21.

[4] *Libyan Memorial*, para. 4.24, disapprovingly quoted by Malta in its *Counter-Memorial*, para. 222.

Parties met to reach an agreement on a line, and Libya made a proposal taking into account what are still, in Libya's view, important relevant circumstances in the present case including the coastal relationship of the Parties[1]. The question then was to arrive at a line of delimitation by agreement, not to develop a full legal case in support of this proposal. The general physical characteristics of the deep areas of sea-bed lying south of Malta were, of course, well known to both Parties at that time[2]. Libya's 1973 proposal, though based primarily on the coasts of the Parties, was in harmony with this fact. It is evident that during a one-day meeting a full discussion of the factors supporting the proposals of each Party would have been inconceivable. Morever, since this meeting the potential legal significance of sea-bed and subsoil features such as the Rift Zone has been amplified by the Court of Arbitration in its 1977 Award and by this Court in its 1982 Judgment. Thus, there is no inconsistency in the approach of Libya to the present delimitation which has always been focussed on the facts. Today, as ten years ago, Libya seeks an equitable result that reflects the relevant circumstances of the present case which, as was observed at the start of this Chapter, consist largely of the physical factors of geography and the features of the sea-bed and subsoil of the continental shelf areas in question.

### D. Sea-Bed and Subsoil Features — a Boundary Within and Following the General Direction of the Rift Zone

6.19 Turning next to the sea-bed and subsoil features of the continental shelf within the relevant area, the Rift Zone is evidently of particular importance in the light of the scientific evidence. As discussed in Chapter 5 above, in its essence this evidence has not been disputed by the scientific papers furnished by Malta with its Counter-Memorial. However, the Maltese Counter-Memorial has criticised Libya for suggesting that the Rift Zone should constitute the boundary between the continental shelf areas appertaining to each of the Parties. This characterisation of Libya's position is inexact. Libya has never advanced the proposition that the Rift Zone *per se* constitutes a natural maritime boundary line between the States. Rather, Libya's position is that the Rift Zone provides critical physical elements for the determination of a boundary line which would lie within and follow its general direction.

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[1] During the April 1973 meeting Libya had no opportunity to develop fully its position. It was only a one-day session in which the Parties had the opportunity to do no more than set forth their positions and at which no comprehensive proposals were formulated. It is evident that Malta had no interest in discussing alternatives to its "median line" position. The out-of-hand rejection of Libya's proposal by the Prime Minister of Malta on the very day the Libyan proposal was tabled attests to this fact. See *Libyan Memorial*, para 4.37.

[2] See paras. 2.03-2.12, above, with reference to Malta's acknowledgment in 1966 of this fact.

6.20 The characteristics and features of the Rift Zone and its general extent have been fully discussed in the Libyan pleadings and are ㉚ illustrated on *Map 13*. With respect to the geological factors of primary importance which underscore the significance of the Rift Zone, of particular pertinence is the scientific study containing an analysis of gravity anomaly data in the area generally underlying the Pelagian Sea[1]. It should be stressed that the bulk of the data on which this study relies has been in existence for some 10 years and is objectively verifiable. What this analysis confirms in geological terms is the magnitude and importance of the Rift Zone. One of the illustrations in this paper depicts a line along the axial ridge of the Rift Zone where the crust has been stretched and hence thinned the most as a result of the deep-seated rifting and faulting ㉗ occurring there. This red line appears on *Map 10* facing page 66 in Chapter 5 above, and has been superimposed on *Map 13*. To quote from the legend appearing on the illustration to this study (attached hereto as *Annex 7*): "This axis is associated with a remarkable Mantle uplifting and Crustal fragmentation." Thus, it reflects the geological factors which point up the extent and continuity of these sea-bed features[2].

6.21 As for the relevant geomorphological — or sea-bed — features that appear within the Rift Zone, they stand out clearly on these bathymetric maps of the area. It is evident that in the area of the Rift Zone that crosses to the south of the Maltese Islands there are two related series of troughs and channels; one may be seen to follow the Malta Trough-Malta Channel route where depths exceed 1,700 metres; the other follows the deepest parts of the Linosa Trough-Medina Channel. The depths and dimensions of these various features were set forth in the Libyan Memorial and its Technical Annex[3]. When the axial ridge depicted on *Map 13* is compared with these lines of deepest sea-bed relief, it may be seen to run in the same general direction and roughly between them.

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[1] FINETTI, I.R., (1984), *op. cit.* See para. 5.27, above. For a definition of "gravity anomalies" see fn. 6 at p. 65, above.

[2] As is stated in FINETTI, I.R., (1984), *op. cit.*, p. 9 (attached as *Annex 7*, hereto):

> "The gravity map (Fig. 13) clearly indicates the area of the [Rift Zone] and the position of the axis of maximum uplift and crustal thinning. The length and the axis of the uplift are well outlined by the continuity of the gravity anomalies across the whole Pelagian Sea. Such evident continuity cannot be found elsewhere in the Pelagian Sea."

It would be along this line that any separation of plate boundaries would be expected to occur, and, if the Rift Zone should develop to this extent, a new ocean would start to be formed. Although the end result of the rifting along the Rift Zone is speculative, the fact that this line represents the areas of greatest thinning is not.

[3] *Libyan Memorial*, para. 3.14, and Technical Annex, Part I, pp. I-12–13.

## E. Geography, Geomorphology and Geology Pointing to the Same Result

6.22 This Chapter has set forth the manner in which the principal physical characteristics of the relevant area between Libya and Malta are reflected on a bathymetric map of the region. With respect to the geographical facts of the case, the key elements of interest are (i) the great disparity in the lengths and configurations of the relevant coasts of the Parties and (ii) the general setting of the dispute and the proximity of third States and existing third State delimitations. As has just been pointed out, the 1973 proposal of Libya reflected, among other considerations, the first of these geographical elements — the marked difference in the lengths and configurations of the coasts of Libya and Malta. This ㉙㉚ proposal has been depicted on *Maps 12* and *13* on which the area comprising the Rift Zone has been superimposed. As for the second of the relevant geographical elements, the presence of third States and existing third State delimitations, it was noted how a line connecting the respective endpoints of these two delimitations runs generally through the Rift Zone[1]. With respect to the geological and geomorphological factors characterising the area, the existence and significance of the Rift Zone constitutes the most striking element. Within the Rift Zone itself, the scientific evidence indicates the presence of an axial ridge line marking the area of maximum stretching of the subsoil underlying the Pelagian Sea. This line also appears on *Map 13*, and may be seen to fall generally between the two deepest geomorphological series of troughs and channels.

6.23 The expression of these factors and their relative proximity to each other illustrates how a balancing of the relevant geographical, geomorphological and geological circumstances of the present case may point to a result that would not be difficult to identify. Such a delimitation would also run right through the disputed area encompassed by the no-drilling understanding entered into between the Parties at the time of the signing of the Special Agreement and, as Chapter 7 below shows, would satisfy the test of proportionality[2]. It is this combination of circumstances which suggests that it should not be an insurmountable task, contrary to Malta's assertion, for the Court to indicate how in practice these relevant facts and circumstances might be reflected by the Parties in negotiating a line of delimitation dividing the areas of continental shelf between them[3], thus enabling them to arrive at a delimitation without any difficulty.

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[1] It may also be noted that the extension of the Libya-Tunisia delimitation, as depicted by the Court in its illustrative Map No. 3 to the 1982 Judgment, almost intersects with the endpoint of the Italy-Tunisia delimitation.

[2] See also Chapter 10 of the *Libyan Memorial*.

[3] See paras. 1.06 and 1.07, above, regarding the safeguarding of any claims of third States in the area.

# CHAPTER 7

## PROPORTIONALITY AS A TEST OF THE RESULT

7.01 The shift in Malta's treatment of proportionality in its Counter-Memorial as compared with its original Memorial is welcome if only because it enables the dispute on this point to be conducted in more realistic terms. In its Memorial, Malta asserted the irrelevance of the proportionality test in the present case[1]. In its Counter-Memorial, Malta devotes the whole of Chapter IV to proportionality, conceding its general relevance to a delimitation in accordance with equitable principles[2], but still attempting to limit its application in the present case[3]. Nevertheless, basic differences between the Parties exist both at the conceptual level — that is to say, in relation to the role of proportionality in principle — and at the factual level, in terms of how, if at all, it should be applied having regard to the facts of this case. It will help to clarify the points in issue if these two levels are dealt with separately below.

### A. Proportionality in Principle

#### 1. Common Ground Between the Parties

7.02 The Parties now share the view that proportionality is inherent in any delimitation in accordance with equitable principles although Malta, somewhat inconsistently, still contends that proportionality is not applicable in the present case[4]. They equally share the view that proportionality in itself is not a source of title to a continental shelf area, but a criterion for evaluating the equitableness of a delimitation[5]. Beyond this, however, there is little on which the Parties agree.

#### 2. The Principal Points in Issue Between the Parties

7.03 The main points of disagreement may be most readily identified by reference to the critique of Libya's position found in the Maltese Counter-Memorial. Reduced to its essentials, this critique takes three steps. *First*, Malta attributes to Libya a position regarding proportionality which Libya has, in fact, never advanced. This is the Maltese claim that, in effect, Libya employs proportionality as a method of delimitation[6]. *Second*, Malta attacks this hypothetical position, which is of its own making, as constituting an "apportionment" of the continental shelf. *Third*, Malta thus avoids discussing the proper role of proportionality in the delimitation process and fails to apply the test of proportionality even to its own proposal for an equidistance boundary. Each of these steps requires some comment in order to place the issue in the appropriate context.

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[1] *Maltese Memorial*, para. 129.

[2] *Maltese Counter-Memorial*, para. 237.

[3] *Ibid.*; *Libyan Counter-Memorial*, paras. 6.25-6.32.

[4] *Maltese Counter-Memorial*, para. 243.

[5] *Ibid.*, para. 237; *Libyan Memorial*, para. 6.90.

[6] *Maltese Counter-Memorial*, para. 221.

7.04 At the outset, it is convenient to dispense with one point raised by Malta. This is the comment that Libya does not treat proportionality as a "principle", and accords to it only a secondary role[1]. Of course, the jurisprudence has emphasised that proportionality is not a principle or method of delimitation, but rather a criterion or test of the equity of the result[2]. This, however, does not diminish the importance of proportionality since, as the Court has noted, it remains a fundamental "aspect of equity[3]". Thus, it is quite wrong to say that Libya accords proportionality a secondary role.

7.05 The major criticism by Malta, which merits more attention, lies in the assertion that Libya is advocating the use of proportionality as a delimitation method — "a dogmatic basis for what is in effect a delimitation[4]". To avoid all further misunderstanding, it should be pointed out that this allegation finds absolutely no basis in any position put forward by Libya in its pleadings or elsewhere. Nowhere has Libya relied on proportionality as a method of delimitation. Malta has simply chosen to ignore what Libya has actually said on the subject of proportionality[5].

7.06 Instead, Malta has attempted to equate the 1973 delimitation proposal made by Libya with Libya's views on the role of proportionality as a legal concept. That this is Malta's design is clear from paragraph 221 of its Counter-Memorial where it is asserted that the meetings between representatives of the Parties of April 1973 "reveal the primary reliance upon a certain conception of proportionality" and that Libya "has continued to rely upon this conception of proportionality in its Memorial". Having thus created the impression that Libya's views on proportionality are reflected in its 1973 proposal — erecting in effect a straw man — Malta proceeds to attack this position.

7.07 The reasoning underlying Libya's 1973 proposal has been discussed in the previous Chapter. As was there pointed out, the 1973 proposal was based on the physical realities of the particular situation. It is true that Libya did utilise a ratio between the lengths of the relevant coasts of the Parties in order to arrive at a proposal which would reflect the geographic facts of the setting. That coastal ratio came into play, however, only as a technique for giving comparable treatment to the relevant coasts of each Party so that each kilometre of the Maltese coast would receive more or less the same weight as each kilometre of the Libyan coast. Thus it was that the 1973 proposal of Libya took account of geography and the relevant coasts of the Parties and did not involve proportionality in the sense of apportioning out areas of continental shelf.

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[1] *Maltese Counter-Memorial*, paras. 2.18-2.20.

[2] See, especially, *Anglo-French Arbitration, Decision of 30 June 1977* (Cmnd. 7438), p. 61, para. 101.

[3] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 91, para. 131.

[4] *Maltese Counter-Memorial*, para. 221.

[5] See *Libyan Memorial*, Chapter 10, and *Libyan Counter-Memorial*, Chapter 6.

7.08 The justification for such a method is self-evident. This Court has emphasised that:

> "The geographic correlation between coast and submerged areas off the coast is the basis of State's legal title . . . the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it[1]."

Similarly, the Court of Arbitration has observed that:

> "A State's continental shelf, being the natural prolongation under the sea of its territory, must in large measure reflect the configuration of its coasts. Similarly, when two 'opposite' or 'adjacent' States abut on the same continental shelf, their continental shelf boundary must in large measure reflect the respective configurations of their two coasts[2]."

Thus, if the coasts are the starting point for determining the areas to be delimited, and if the continental shelf of a State should generally reflect the configuration of its coasts, the logical sequence for arriving at a suitable method of delimitation would seem to be:

(i) to determine which particular coasts are relevant for the delimitation between the Parties concerned[3];

(ii) to determine which areas of shelf are relevant because they abut on these coasts in the sense that the areas are the "natural prolongation" of the territory of one or the other Party[4];

(iii) to determine what are the relevant geographical and other physical facts and how they are to be reflected in the delimitation within the relevant area;

(iv) to balance in any other considerations (*e.g.*, the conduct of the Parties) that may be relevant for an equitable delimitation; and finally

(v) to test the result by means of the criterion of proportionality.

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[1] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 61, para. 73. And see *Libyan Memorial*, paras. 7.07-7.20, for a further discussion.

[2] *Anglo-French Arbitration, Decision of 30 June 1977* (Cmnd. 7438), p. 60, para. 100.

[3] This is the stage of the process discussed in the *Libyan Memorial*, paras. 10.08-10.11.

[4] This second stage of the process is described in the *Libyan Memorial*, paras. 10.12-10.18.

7.09 It is the third stage of the process which calls for the "weighting" of the two coasts and the balancing of the relevant circumstances of coastal length and configuration with the other relevant factors, whereas it is the last stage by which the result is tested by means of the element of proportionality. Of course, the Maltese thesis is essentially that no weighting is required nor any testing necessary, since it regards all coasts in the abstract as equal, but that thesis accords neither with common sense nor with the law[1]. Some "weighting" has to occur if Courts are to treat the geographical factors realistically and to balance them into the delimitation equation, for to ignore very real differences in two coasts is to ignore the facts of nature, the true geographical factors from which the delimitation exercise begins. As the Court indicated in its 1969 Judgment, there can never be a question of "rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline[2]". Whether one describes this process as "weighting", or "evaluating the geographical factors" makes very little difference. The point is that Courts have to take account of real differences[3], and the only question is how should they do this.

7.10 Two criteria suggest themselves (indeed, it is difficult to imagine any others): the *first* is the length and configuration of the coasts, and the second is the size of the land territory or landmass which extends into and under the sea from the coast or coastal front. The *first* criterion needs no further explanation. The *second* criterion follows from the fact that it is the natural prolongation of the landmass — the extension of the land territory into and under the sea — which appertains to a State as its continental shelf. And whilst the method of delimitation may well have to be based on the actual coast, good sense would require that an equitable delimitation should reflect the landmass behind the coast in terms of the "weight" of its natural prolongation. The treatment of islands in the jurisprudence and in State practice where they have received reduced effect supports this view. It appears that the size of the island will virtually always be a relevant factor in the delimitation[4].

7.11 However, whether the comparisons are of length *simpliciter*, or of length plus weight, they are necessarily reflected in a ratio. But to confound this method of delimitation with the "test of proportionality" is a gross misrepresentation of this method.

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[1] See *Libyan Counter-Memorial*, paras. 7.16-7.20. Indeed, in the *Tunisia/Libya* case how else could the change of direction in the Tunisian coast be taken into account without being accorded a certain "weight" in the delimitation?

[2] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, pp. 49-50, para. 91.

[3] Of course minor differences or incidental features of coastal configuration can be taken account of by representing a coast by a "coastal front".

[4] See, in particular, para. 4.12, above, and, generally, the *Libyan Counter-Memorial*, Annex of delimitation agreements.

7.12 Proportionality is a criterion whereby the equity of the result arrived at by balancing the facts and relevant circumstances is tested. Indeed, as Libya has already pointed out in its Counter-Memorial[1], reliance on proportionality cannot be *per se*, drawn from a reliance on the idea of a "just and equitable share" which the Court has rejected in its 1969 Judgment[2], for the Court itself has used the proportionality test in the very cases in which it had rejected the doctrine of the "just and equitable share". In addition, one cannot escape the fact that the Court has held in prior cases that a reasonable degree of proportionality should exist between the extent of the shelf areas appertaining to a coastal State and the length of the relevant part of its coastline. While it is understandable that Malta does not like the result of the application of the proportionality test to its equidistance proposal, nature cannot be refashioned, and it serves no constructive purpose for Malta to circumvent this fact through a suggested view of proportionality attributed to Libya that, in fact, is totally at variance with Libya's pleadings.

### B. The Relevant Area

7.13 It is apparent that the proportionality test is to be applied within the area which is relevant to the delimitation. Although the presence of third States is germane to the definition of the relevant area, it is the view of Libya that for purposes of the present case this area is to be defined essentially on the basis of the coasts of the Parties which are related to each other even if third State claims may potentially exist in parts of this area. The area considered relevant to the present dispute was outlined in paragraphs 10.12 to 10.18 of the Libyan Memorial. The fact that third States may claim certain parts of this area cannot serve to alter the basis for determining this area as relevant to a delimitation between Libya and Malta, even though the extent of the area to be delimited definitively between the Parties may be thereby affected. It is also apparent that in any part of the area in which third States have claims the delimitation must remain non-prejudical until such time as these claims are resolved. As the Court stated in its 1982 Judgment:

> "It is legitimate to work on the hypothesis of the whole of that area being divided by the delimitation line between Tunisia and Libya; because although the rights which other States may claim in the north-eastern portion of that area must not be prejudged by the decision in the present case, the Court is not dealing here with absolute areas, but with proportions. Indeed, if it were not possible

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[1] *Libyan Counter-Memorial*, para. 6.15.

[2] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 22, paras. 19-20. And see the similar views by the Court of Arbitration in the 1977 *Anglo-French Arbitration* and the Court in the 1982 *Tunisia/Libya* case, quite properly cited by Malta in its *Counter-Memorial*, paras. 226-227.

to base calculations of proportionality upon hypotheses of this kind, it is difficult to see how any two States could agree on a bilateral delimitation as being equitable until all the other delimitations in the area had been effected[1]."

### C. Proportionality in Practice

7.14 It may be recalled that the Libyan Memorial, having identified the relevant coasts and the relevant area, suggested that the ratios of the two coasts (broadly between 1:8 and 1:12) be applied to determine whether, within the relevant area, a delimitation which falls within the Rift Zone and which takes into account all of the relevant circumstances meets the test of proportionality[2]. The conclusion reached was that such a delimitation would satisfy this test. Libya did not advance a precise line, since the Court's task is not to determine a precise line.

7.15 Obviously, when, in their negotiations, the Parties move on to the task of determining the precise line, that line will have to produce a result which reflects the balancing up of all the relevant factors and circumstances and which meets the proportionality test[3]. The previous Chapter has shown how the geographical, geological and geomorphological factors, if properly reflected in the delimitation, lead to a similar result. Each of these factors points to a solution falling within the area of dispute as evidenced by the conduct of the Parties, respects the presence of third States and existing third State delimitations, and produces a result within the Rift Zone which satisfies the test of proportionality as a "touchstone of the equitableness[4]" of the result. There is no particular magic or sanctity in any one method of arriving at the particular delimitation. What matters is that the result should be equitable: it should be a product of a balancing of the relevant facts and circumstances of the case and should reflect approximately the ratio of the relevant coasts of the two Parties. The drawing of the precise line should not present major problems for the Parties, once the Court has indicated the relevant area along with the relevant circumstances, the weight to be accorded them and how they are to be reflected in the delimitation, and the ratio of areas which such a delimitation established according to equitable principles should bring about.

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[1] See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 91, para. 130. See also paras. 1.06 and 1.07, above.

[2] *Libyan Memorial*, para. 10.18. This broad approach was followed in the *Libyan Counter-Memorial*, para. 8.05.

[3] For this purpose, "nice calculations" of proportionality need not be used (*Anglo-French Arbitration, Decision of 30 June 1977* (Cmnd. 7438), p. 117, para. 250), but rather a "reasonable degree of proportionality" should be achieved between the areas of shelf appertaining to each State and the general length of their relevant coasts.

[4] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 78, para. 108.

7.16 If the additional factor of weighting of size of the landmass or land territory is considered, it should operate so as to justify the selection of a higher, rather than a lower, ratio of coasts in the present case. As we have seen, depending upon how the relevant coasts are measured, the coastal ratio could be anything from 1:8 to 1:12. But, given the fact that the factor of size is weighted so heavily in Libya's favour because of the enormous landmass lying behind the Libyan coasts compared to the very small size of the Maltese Islands, this would suggest that the delimitation should be tested by taking at least the 1:12 ratio rather than the 1:8.

7.17 The Maltese Counter-Memorial has not disputed Libya's determination as to which coasts of the Parties are relevant to the delimitation[1]. Nor has it taken exception to the coastal ratios, indicated in the Libyan Memorial, which flow from a comparison of these coasts[2]. Moreover, while it is true that the Maltese Counter-Memorial challenges the importance of the Rift Zone, it has not advanced any argument contradicting the fact that a delimitation within and following the general direction of the Rift Zone would satisfy the criterion of proportionality based on the ratio of the coastal lengths of the Parties and maritime areas appurtenant to them.

7.18 Instead, Malta has accused Libya of being illogical. The Maltese argument is that Libya treats natural prolongation and proportionality as producing a coincidental result[3]. According to Malta, since there is no necessary correlation between proportionality, as a function of the lengths of coastlines, and the principle of natural prolongation, the fact that both produce results within the Rift Zone is meaningless. Thus the Maltese Counter-Memorial asserts: "If the proportionality argument is valid, the natural prolongation argument is irrelevant. If the latter principle is valid, the proportionality argument is irrelevant[4]."

7.19 This line of argument entirely misses the point: it illustrates how the Maltese pleadings have failed to appreciate the proper function of proportionality. There is no reason in law why each and every factor relevant to delimitation must of necessity "coincide" with proportionality. In the *Tunisia/Libya* case, for example, there was no inherent correlation between the existence of a *modus vivendi* — a line extending roughly perpendicular from the parties' common land boundary — and the test of proportionality employed by the Court. And yet the existence of such a *modus vivendi* was deemed to be a relevant factor in that delimitation[5]; its recognition as a relevant circumstance was not considered to be exclusive of any other element or circumstance; and certainly not to be preemptive of the requirement that the equitableness of the outcome be verified by application of the proportionality test. Similarly, in that case there was no automatic correlation between, or mutual exclusion of, the giving of one-half effect to the Kerkennah Islands and the application of the proportionality test.

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[1] These coasts were identified in the *Libyan Memorial*, paras. 10.08-10.11.

[2] See *Libyan Memorial*, para. 10.11.

[3] *Maltese Counter-Memorial*, para. 233.

[4] *Ibid.*, para. 235.

[5] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, pp. 84-85, para. 119.

7.20 The reason why there is no predetermined relation between proportionality and any particular factor is straightforward. It is simply because "proportionality" *per se* does not result in any one particular line of delimitation representing a division of areas of shelf. Within any given area, an infinite number of lines can divide the area in a set proportion. But this is not the role of proportionality as the Courts have made use of it. For proportionality is not applied to produce a "line" which is then compared with the individual factors and relevant circumstances of the case to see if it is consistent with individual factors. Proportionality is used as a test of the result — a result which has been arrived at by selecting, weighing and balancing-up all the relevant considerations. The question which the criterion of proportionality seeks to answer is: does the delimitation to which a balancing of the facts and relevant circumstances leads produce an equitable result? Is it one which includes —

> "the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf and the length of the relevant part of its coast . . . [1]"?

7.21 If the proportionality test is applied to Malta's proposed median line delimitation, the answer to these questions is unequivocally, "No". By no stretch of the imagination may it be claimed that, within the area relevant to delimitation between Libya and Malta, an equidistance line produces a result which includes the "reasonable degree of proportionality" that this Court has insisted upon in both its 1969 and 1982 decisions. The Maltese proposal is disproportionate upon its face. It fails outright the test of proportionality "as an aspect of equity[2]".

7.22 In summary, what needs to be stressed is that the treatment afforded to proportionality in the Maltese Counter-Memorial remains purely theoretical; it adheres to the abstract trapezium exercise[3], and is divorced from any appreciation of the actual coasts of the Parties or the actual area which lies between them. This is in itself the best proof that the realities of the situation are wholly inconsistent with Malta's proposal.

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[1] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 93, para. 133 (B)(5) [*dispositif*].

[2] *Ibid.*, p. 91, para. 131.

[3] See Chapter 7 of the *Libyan Counter-Memorial* and the Annex thereto for a critique of the trapezium exercise.

The moment one examines the actual coasts and the area relevant to those coasts (taking account of the presence of third States), the inequity of the median line is all too apparent. As for proportionality, it must remain Malta's thesis that proportionality is irrelevant. For once its relevance is conceded, the lack of proportionality in Malta's median line is glaringly obvious. And once that is revealed, the inequity of the result sought by Malta is inescapable. In contrast, a delimitation within and following the general direction of the Rift Zone produces a result which takes into account all the physical factors and relevant circumstances and satisfies the test of proportionality.

# CHAPTER 8

## OBSERVATIONS ON THE APPROACHES OF THE PARTIES TO DELIMITATION IN THE PRESENT CASE

8.01 In the Introduction to this Reply, attention was called to the numerous "misunderstandings and misinterpretations" which characterise the Maltese Counter-Memorial. Libya's first reaction was that the errors should be corrected one by one. On closer examination, it was found that any attempt to deal with each and every one of these "mistakes" would lead to a document of inordinate length and complexity. Accordingly, comment in the Introduction was limited to just a few illustrative examples of the misunderstandings or misinterpretations which appear in that Chapter.

8.02 The final Chapter of the Maltese Counter-Memorial, Chapter XIII, adopts a somewhat different approach from that of Chapter I. It suggests adverse implications "for the development of the principles of law and equity relating to the continental shelf[1]" flowing from the Libyan arguments in the present case. The alleged implications are themselves a fantasy and are based on an incorrect and, at times, distorted view of the Libyan arguments. In fact, the Chapter is one which should be examined closely in order to appreciate the extent to which the Maltese Counter-Memorial has employed misrepresentation and exaggeration as a technique of pleading. In the end, the Court will, of course, judge where the truth lies. Even the Maltese Counter-Memorial admits (paragraph 333) "that the Libyan Memorial *appears to accept* the existing body of principles". Properly understood, the Libyan case is directly founded on the applicable relevant principles and rules of international law concerning delimitation of the continental shelf.

8.03 Apparently, in an attempt to evade this self-evident fact, paragraph 332 of the Maltese Counter-Memorial resorts to the presentation of a view which is a mere caricature of Libya's position. Libya has not, contrary to what is said in paragraph 332(a), presented sea-bed features as "natural frontiers" or, as is alleged in paragraph 332(d), "topography" as one of the "actual bases" for a "primary delimitation". In fact, the whole concept of a "primary delimitation" is alien to Libya's thinking. A composite feature of the dimensions of the Rift Zone does not, in and of itself, provide a natural boundary line. However, the physical factors of geomorphology and geology, just as those of geography, have been brought to the Court's attention because they are of relevance to the entitlement of the Parties and constitute in any event relevant circumstances that provide important elements pointing to an equitable result.

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[1] *Maltese Memorial*, para. 331.

8.04 Contrary to what is said in paragraph 332(b), Libya has never talked in terms of the "jurisdictional needs" of one Party being "more significant" than those of the other. If by "territorial extent" in paragraph 332(c) is meant the factor of the very small size of the Maltese Islands and, in particular, their very short lengths of coast in comparison to Libya's very large size and extensive coasts, then Libya has, consistent with the jurisprudence, advanced these geographical factors as relevant circumstances, particularly as concerns the coasts of each Party that are related to the shelf area to be delimited. As to paragraph 332(d), it misstates completely Libya's view as to the role of proportionality, a matter adequately brought out in the previous Chapter.

8.05 These misstatements of Libya's case have paved the way for the Maltese Counter-Memorial, in paragraphs 333 and 345, to suggest that dire consequences would result if Libya's approach to the present case — wrongly described as a "radical change in the existing structure of the law of maritime jurisdictions" — were favourably considered by the Court. Malta puts its threat of dire consequences in these words:

> "Were an international tribunal to show favour to arguments of the type advanced by Libya in this case, the law would be thrown into confusion. The implications, the invitation to forms of aggrandisement and revisionism which such a change of direction in the law would presage, would be serious indeed[1]".

8.06 But this alarmist suggestion that the case put forward by Libya represents a "change of direction in the law" — in fact a "radical change" — is pure fabrication. It is not Libya but Malta which is advancing a novel approach to delimitation — an approach which, in fact, did not fully take form until the Maltese Counter-Memorial. It is that approach which is contrary to the jurisprudence and tendencies of legal development from the Truman Proclamation of 1945 to the 1982 Convention. It is an approach based on a theoretical priority for the equidistance method now bolstered by appeal to a "distance principle" whose relationship to delimitation of the continental shelf is tenuous at best, particularly in the light of paragraph 10 of Article 76 of the 1982 Convention. The Libyan case, on the other hand, is solidly grounded in the particular facts of the present case and in the jurisprudence.

8.07 It is not necessary for Libya to try to outdo Malta in predicting the dire consequences that would result if the Maltese approach to delimitation should find favour with the Court. For Malta's line of argument does violence to the fact that no special or privileged status has been accorded to the equidistance method in the jurisprudence, in State practice and in the 1982 Convention. The Maltese approach rests on alleged

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[1] *Maltese Counter-Memorial*, para. 345.

"principles" with no facts to back them up or to establish their application in the present case. It ignores or side-steps the circumstances which in the jurisprudence have clearly been regarded as relevant to continental shelf delimitation, namely, the specific geographical facts such as coastal lengths, coastal relationships vis-à-vis the area of continental shelf to be delimited, sea-bed features and the presence of third States. In Malta's view relevant circumstances may be used to "refine" the "equitable nature of the primary boundary" as to the "marginal aspects of the equal relationships of the two coastal States", but never to require a "major re-ordering of the primary delimitation[1]". Such a view relegates the relevant circumstances of the particular case — and hence equitable principles — to a role subordinate to the equidistance method which, as Malta would have it, *a priori* leads to a "primary boundary" which is said to be *prima facie* "equitable".

8.08 This primary delimitation theory only clearly emerged in Malta's Counter-Memorial, and may well be termed novel. The *a priori* role that Malta would assign to equidistance never has existed in customary international law. In fact, the Truman Proclamation of 1945, invoked no less than four times in the final chapter of the Maltese Counter-Memorial, itself suggests that such a position as Malta now advances had no standing even in 1945. For the Proclamation states unequivocally:

> "In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles[2]."

8.09 What is so different between the approaches of the Parties, then, is this. The Libyan approach starts with the view that each case of continental shelf delimitation has to be considered on its own facts. Accordingly, Libya examines the facts, opening up the map, observing the coasts of the Parties that relate to the area to be delimited and all the geographical, geomorphological and geological features. Other factors such as the presence of third States and the conduct of the Parties are examined. Given this special situation involving these various factual circumstances, the task, in the view of Libya, is to determine which ones are relevant and how much weight should be accorded those that are relevant in order to reach an equitable result. The way in practice of achieving that result flows from these facts — it is a function of how best to achieve an equitable result.

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[1] *Maltese Counter-Memorial*, paras. 340-341. This novel approach concerning the "primary delimitation" is unambiguously set forth in paras. 338-344 of the *Maltese Counter-Memorial.*

[2] See *Libyan Memorial*, Annex 80.

8.10 Malta's approach is designed to circumvent the facts. To do this a sort of code is employed. But this code is readily decipherable. Malta's lip service to the geographical factors of the present case is quite transparent as has been brought out in Chapter 5 above and in the Libyan Counter-Memorial[1]. Malta denies the relevance of size, coastal lengths and coastal relationships. Instead, in Chapter XIII, Malta refers to —

> "the equitable principle of non-encroachment which recognises the element of self-protection and requires that proximity of a coastal front should predominate over any geomorphological arguments which would allow cutting across the coastal front of one coastal State in favour of another[2]."

Similarly, Malta asserts:

> "In principle coastal States which are opposite and abut upon the same area of continental shelf should be accorded an equal lateral reach of jurisdiction[3]."

And, again:

> " . . . the equality of lateral reach from the coasts which results from equidistance is in harmony with the traditional thinking behind the legal principles governing maritime delimitation[4]."

These pronouncements have no support in the jurisprudence and none is cited. Terms like "equal reach of jurisdiction" and "equality of lateral reach" are just code words for use in getting around the facts — of rendering irrelevant the coasts of the Parties and the other relevant circumstances of this particular case. In reality, these propositions are nothing more than a restatement of the equidistance method in other terms.

8.11 Similarly, Malta's resort to State practice is another device for deflecting attention from the facts of the present case as if some determinative principle or rule of delimitation can be drawn from such practice in other factual settings. By the same token, Malta's new emphasis on natural prolongation as a purely spatial or distance concept is well suited to a theory of leap-frogging features of the sea-bed as well as ignoring size, coastal lengths and coastal relationships; but, similarly, it has no support in the jurisprudence or in the 1982 Convention.

8.12 Malta's case is built around abstractions and theories — principles that lack a legal foundation, rather than facts and relevant circumstances. The equitableness of Malta's result is not arrived at in the light of the facts and relevant circumstances in this particular case but on the basis of an *a priori* judgment that equidistance must be the primary delimitation to be adjusted in an appropriate case — but not here — and only slightly adjusted if "relevant considerations" so require.

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[1] See, generally, Chapter 2 of the *Libyan Counter-Memorial*.

[2] *Maltese Counter-Memorial*, para. 337(b).

[3] *Ibid.*, para. 340.

[4] *Ibid.*, para. 339.

8.13 Apparently these "relevant circumstances" have nothing to do with geography, geomorphology or geology. They appear to be the various considerations so prominently advanced in the Maltese Memorial which Libya regards either to have been found by the Court as not relevant in a case of continental shelf delimitation — considerations such as comparative economic needs and lack of natural resources — or to be unproven or irrelevant in the present case — considerations such as "security needs". It does not suffice merely to state:

> "The security needs of small States and especially small island States are no less, to say the least, than those of other States[1]."

What are Malta's security needs that require it to have rights to the seabed and subsoil as far south as almost 34° N latitude and as far east as 18° E longitude, let alone the Medina Bank area? If Malta has security interests that would be affected by Libya's claim, just what are they?

8.14 The case-by-case, factual approach of Libya is clearly in accord with the jurisprudence, the basic principle of delimitation by agreement, and the practice of States. It also makes sense; no situation is entirely like another. If equitable principles are to govern the result, the facts of each case have to be the starting point and key element in any case of continental shelf delimitation. It is clear, as the Court itself has noted, "that it is virtually impossible to achieve an equitable solution in any delimitation without taking into account the particular relevant circumstances of the area[2]". An abstract, theoretical approach is always prone to work injustice in particular cases. Such an approach as adopted by Malta in the present case would certainly do so. To adopt Malta's approach would be to prejudge future delimitations regardless of the facts or other relevant circumstances and considerations in the particular case.

8.15 The crucial task lies in balancing the various factors relevant to the delimitation and in weighing the effect each particular circumstance should have in the overall result[3]. It is not surprising that a factor of major importance in one case may be less in evidence in another. Given that each particular delimitation situation presents its own matrix of relevant facts, this is to be expected. But this does not prevent all the relevant factors from being balanced in a manner which points to an equitable solution in that particular case. What then remains is for the result that emerges from the facts to be tested by means of the element of proportionality to determine whether, in fact, a result which bears a reasonable degree of proportionality has been achieved. This does not, however, convert the test of proportionality into a "method" of delimitation[1].

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[1] *Maltese Counter-Memorial*, para. 339.

[2] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 60, para. 72.

[3] *Ibid.*, p. 60, para. 71.

8.16 The Libyan approach to delimitation in this case is dictated by — and indeed arises directly out of — the principles and rules of international law concerning continental shelf delimitation as they have evolved down to the present day. Such an approach cannot threaten the existing principles and rules, and Malta's dire predictions are completely unfounded. Libya is confident that this approach is the right one and that it gives scope to the Court to fulfill its task under the Special Agreement in appreciating the geographical and other circumstances relevant to the delimitation in the particular case[2], a role denied to the Court by Malta's insistence on the primacy of the equidistance method.

8.17 In spite of the diversions and false scents provided by the Maltese Counter-Memorial, it is Malta's insistence on its equidistance line that remains a principal issue in the present case. It is the main obstacle to a solution which will achieve an equitable result in accordance with the principles and rules applicable to continental shelf delimitation. The Maltese contentions concerning the "distance principle" confuse the issue of delimitation and have no real impact. Malta's arguments on alleged acquiescence have been shown to be without merit. There is overall nothing in the Maltese Counter-Memorial to cause Libya to alter the basic approach adopted in its Memorial which rejected the equidistance method as obligatory and maintained that its application in the present case would not lead to an equitable result. Libya continues to seek an equitable solution which would take account of all the relevant facts and circumstances of this case. Accordingly, Libya continues to maintain the Submissions made in its Memorial.

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[1] See paras. 7.12 and 7.20, above.

[2] *Anglo-French Arbitration, Decision of 30 June 1977* (Cmnd. 7438), p. 48, para. 69.

## SUBMISSIONS

Libya confirms and maintains its Submissions made in its Memorial as follows:

*In view of* the facts, the statement of the law, and the application of the law to the facts as set forth in the Libyan Memorial, the Libyan Counter-Memorial, and in this Reply; and

*In view of* the observations concerning the facts as stated in the Maltese Memorial and Counter-Memorial and the statement of law as therein contained;

*Considering that* the Special Agreement between the Parties requests the Court to decide "what principles and rules of international law are applicable to the delimitation of the area of the continental shelf which appertains to the Republic of Malta and the area of continental shelf which appertains to the Libyan Arab Republic, and how in practice such principles and rules can be applied by the two Parties in this particular case in order that they may without difficulty delimit such areas by an agreement" in accordance with the Judgment of the Court:

*May it please the Court*, rejecting all contrary claims and submissions, to adjudge and declare as follows[1]:

1. The delimitation is to be effected by agreement in accordance with equitable principles and taking account of all relevant circumstances in order to achieve an equitable result.
2. The natural prolongation of the respective land territories of the Parties into and under the sea is the basis of title to the areas of continental shelf which appertain to each of them.
3. The delimitation should be accomplished in such a way as to leave as much as possible to each Party all areas of continental shelf that constitute the natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the other.
4. A criterion for delimitation of continental shelf areas in the present case can be derived from the principle of natural prolongation because there exists a fundamental discontinuity in the sea-bed and subsoil which divides the areas of continental shelf into two distinct natural prolongations extending from the land territories of the respective Parties.

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[1] The numbered Submissions are as they appear in the *Libyan Memorial*.

5. Equitable principles do not require that a State possessing a restricted coastline be treated as if it possessed an extensive coastline.

6. In the particular geographical situation of this case, the application of equitable principles requires that the delimitation should take account of the significant difference in lengths of the respective coastlines which face the area in which the delimitation is to be effected.

7. The delimitation in this case should reflect the element of a reasonable degree of proportionality which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the respective States and the lengths of the relevant parts of their coasts, account being taken of any other delimitations between States in the same region.

8. Application of the equidistance method is not obligatory, and its application in the particular circumstances of this case would not lead to an equitable result.

9. The principles and rules of international law can in practice be applied by the Parties so as to achieve an equitable result, taking account of the physical factors and all the other relevant circumstances of this case, by agreement on a delimitation within, and following the general direction of, the Rift Zone as defined in the Libyan Memorial.

(Signed) ..........................................................................
ABDELRAZEG EL-MURTADI SULEIMAN
Agent of the Socialist People's
Libyan Arab Jamahiriya

# ANNEXES TO THE REPLY OF LIBYA

## Annex 1

### EXTRACTS FROM MALTESE PARLIAMENTARY DEBATES, 20-22 JULY 1966

*(Unofficial translation)*

[20 July 1966]

DEBATE ON CONTINENTAL SHELF BILL

CONTINENTAL SHELF BILL

Hon. Dr. T. Caruana Demajo (Minister of Justice): I move that the Draft Bill on the Continental Shelf be read a second time.

Mr. President, as the House will remember, the Draft Bill was presented in the last Parliament. Its general principles and aims were discussed, and it was even given a second reading; unfortunately, however, Mr. Speaker, this Draft Bill did not become Law because of the dissolution of Parliament.

Today, for the benefit of the new Honourable Members of the House, and also because some doubts were expressed by the Opposition when this Draft Bill was discussed last time, I shall repeat, in brief, the principles and aims of the Draft Bill.

This Draft Bill assumes and indirectly affirms the sovereignty of Malta over the Continental Shelf, and gives to the Government all the rights which Malta has over the Continental Shelf, as well as all the natural resources of the Shelf. I think that the House will appreciate that this sovereignty which Malta has over the Continental Shelf does not come from the Draft Bill which lies before the House, but comes from International Law which has now been enshrined in the Convention on the Continental Shelf. This Draft Bill therefore assumes Malta's sovereignty and continues to assert and affirm it, as happens in every country which possesses a Continental Shelf. However, although this sovereignty over the Continental Shelf exists independently of whether or not there is a Municipal law, and thus it existed without the Draft Bill which lies before the House, and without the amendments which were made to the Petroleum (Production) Act, 1958, it is necessary, Mr. Speaker, to have a Municipal law so as to hand over to the Government the rights which Malta has over the Continental Shelf and over its natural resources, and so as to regulate, or rather, I should say, so as to find a means of regulating the exploration and exploitation of this Shelf and of its resources.

Thus in the first instance the Draft Bill which lies before the House today invests in the Government the rights which Malta has over the Continental Shelf and over its natural resources.

Hon. P. Carachi: For the fourth time this evening I ask that there should be a quorum, because we do not have a quorum. I am asking this for the fourth time, Mr. Chairman.

*At 8.42 p.m., a quorum being present, the sitting was resumed.*

Hon. Dr. T. Caruana Demajo: Thus, Mr. Speaker, in the first instance, the Draft Bill which lies before the House invests in the Government all the rights which Malta has over the Continental Shelf and over its natural resources and by making it a condition that all the oil which may be found here in Malta will be subject to the relevant provisions of the Petroleum (Production) Act, it prohibits the exploration for oil without a Government licence, and regulates also the granting of that licence and the conditions under which it must be given.

The relevant provisions of the Petroleum (Production) Act, 1958, to which I have referred are to be found in Section 3, sub-section 2 of the Bill which lies before us.

The Draft Bill also provides for the protection of the living resources of the sea and also for the cleanliness of the sea, and it will impose penalties on anyone who discharges oil or allows it to flow out in a way which would pollute the sea.

The Draft Bill also controls, in so far as it is necessary for the production and exploitation of oil, underwater cable installations, the laying down of underwater cables is what I meant to say.

It results, from Section 4, that this Draft Bill gives the Prime Minister the power to indicate the area or areas over which, from time to time, the right of Malta over the Continental Shelf may be exercised, and he has this power not only as a consequence of an agreement with other countries over this Continental Shelf but also for the purpose of exercising certain rights for the protection of the installations or other equipment which it may be necessary to install and for the application of the Maltese law to these installations.

Hon. P. Carachi: Mr. Speaker, I wish that things would be taken seriously. I had insisted on a quorum, and this is now the fifth time that I am insisting on it!

We should be ashamed of the fact that in this House we are cutting such a bad figure. If we are unable to stay in this House to carry out our duties, we should not have come here, we should not have had a sitting!

*The Clerk counted the House and, a quorum being present, the debate continued.*

Hon. Dr. T. Caruana Demajo: In this context I would like to explain a few things about the limits of the Continental Shelf.

The Continental Shelf of every country has two main limits. The first limit of the Continental Shelf is established by the depth of the sea because it is a fundamental principle of International Law that sovereignty only extends as far as it can be exercised, and modern technological means only permit exploitation up to a certain depth. The second limit of the Continental Shelf comes into being when two States claim equal or conflicting rights, that is when the shelf of one country, in line with the first limitation which I mentioned earlier, meets that of another country.

As regards the second limitation, it is naturally desirable that an agreement should be reached between the States concerned regarding the limits of the Continental Shelf, and the Convention relating to the Continental Shelf, to which I have already made reference, already provides for such an eventuality.

However it is not possible, although it is highly desirable, that there should always be such an agreement. However, even in the case of lack of agreement, the Geneva Convention provides for a median line, which is that line which divides the two shelves.

I am mentioning this mainly because when I moved this Draft Bill in the last Parliament, the Opposition referred to the negotiations with Italy and with the African States.

I would like to make it clear that in so far as Africa is concerned, this matter is not relevant today since the Maltese Continental Shelf and the African Continental Shelf do not meet, and the seas between them are so deep as to prevent exploitation. However, our situation vis-à-vis Sicily is different, Mr. Speaker. But even here I would like to clarify that although it is desirable that there should be an agreement on the limits of the Continental Shelves of Sicily and of Malta, this is not at all essential. Should there be no agreement, Mr. Speaker, the Government of Malta has already made it clear to the Italian Government that until a different agreement is reached, the Maltese Government considers that the median line is that which divides the two shelves.

Finally I would like to refer to what I have already stated in an earlier sitting when the first reading of this Draft Bill was moved regarding the way in which the survey of our Continental Shelf will be carried out, and eventually its consequent exploration and, should oil be found, its exploitation. I also recall that in the last Parliament I had announced that discussions were to take place with companies which had shown an interest in the exploration and exploitation of oil in Malta. In fact, Mr. Speaker, these discussions did take place, but serious doubts were expressed, and these serious doubts were expressed not only by the companies but also by the Government's experts because it emerged that it was not worth while carrying out a preliminary "combined survey" because of the geological structure of our Continental Shelf and the result which such a survey might yield.

The Government is giving this matter all the necessary consideration and it will not be long before it will announce the procedure and the method which it intends to follow . . .

Hon. D. Mintoff: Do I understand correctly that the survey is not going to take place?

Hon. Dr. T. Caruana Demajo: No, it is not going to take place.

Hon. D. Mintoff: Was there no need for it?

Hon. Dr. T. Caruana Demajo: There was no need for it. We were shown as much both by the companies as well as by the experts which the Government has at its disposal. Of course the Government will publish the regulations which in fact are in the process of being prepared by my office, and thus all the preliminary steps will be taken which I am sure, as all members of the House would wish, will have a successful outcome in the interests of the economy of the country should we succeed in finding oil. This is all I had to say regarding the principle and the aim of the Draft Bill which we have before the House.

Hon. Dr. P. Borg Olivier: I second it.

Hon. D. Mintoff: I think, Mr. Speaker, that the Government will not take offence if the Opposition should state that it is not very impressed with the speed and rapidity with which these matters concerning oil are being taken, and I honestly cannot understand how a few months ago the Government felt that there was a need for a survey, and not only that there should be such a survey, but that it should be combined, and that it should be undertaken by all the companies together, and today the Government is stating that it has been informed by the experts that there is no need for it. I cannot understand how they did not know this six months ago and nine months ago. I am saying this on the basis of what I have just heard. I will repeat that it is a mystery to me why the Government was not informed by its experts six months and nine months ago that there was no need for this survey.

I will also repeat, Mr. Speaker, that we should be pleased if agreement is reached with the Italian Government, but the Minister was not particularly explicit on this point. I agree with him over the point that the depth of the sea which divides Malta from Sicily is much less than the depth of the sea which divides Malta from Libya and from Tunis. Thus far I agree with what he says. I also think that the Minister will also agree with me when I say that there is a part of this area where the sea is shallow, especially the area between Malta and Libya. I think that if the Minister were to investigate thoroughly, he would agree with me on this point. From what I know of geology of the sea and of our island, the shallowest part of the whole of the Mediterranean basin is that between Libya and Sicily and the part around Malta. Of course the depth between Malta and Sicily is less than the depth between Malta and Libya, but there is a shallow part in this area which divides Malta from Libya which is so shallow as to permit it to be exploited for the purposes of research for the exploration of oil, and I think that what the Government meant to say when it said that the sea was deep was that the shallow part was so much nearer to Malta that there should not be much cause for dispute on this point between ourselves and Libya, and up to this point we are in agreement.

I have also tried to understand how the law has been drawn up, constructed, and put together, and I could not honestly understand why there are such discrepancies in the penalties for breaking the law which we have before us. For example, if one were to lay a cable in an area designated as a petroleum area, a fine of £50 a day would be imposed, and then if a tanker were to pass through that area and do anything where oil exploration was being carried out, we find that the fine is £100, and then, yet again, if somebody else were to break the law in another way as is mentioned at the end of the law, you will find that there is a fine of £1000.

. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

[22 July 1966]

Hon. Dr. T. Caruana Demajo: During last Wednesday's sitting, the Opposition raised two matters after I had spoken about the principles and aims of the Bill. The Opposition referred to the limits of the Continental Shelf between Malta and the African States and it also referred to the fines which are laid down in the Draft Bill.

As regards the first observation, I can say there is no problem regarding the Continental Shelf of the African States, for the moment at least, because they are separated by a depth which cannot be exploited and, whilst I was explaining the principles of the Bill, I said that one of the principles of International Law is that sovereignty extends only so far as it can be asserted, and modern technology today does not permit exploitation beyond a certain depth.

Hon. D. Mintoff: If you will allow me. There is a part of it, however, which can be exploited, is that not so?

Hon. Dr. T. Caruana Demajo: But they do not touch one another.

Hon. D. Mintoff: But they all touch one another.

Hon. Dr. T. Caruana Demajo: But there is the question of depth.

Hon. D. Mintoff: A part of it. For example, towards Libya it is shallow enough, but this part does not come as far as the area between us.

Hon. Dr. T. Caruana Demajo: Mr. Chairman, as I was saying, there are three different penalties. The first is a penalty of not more than £100 or imprisonment for a period of not more than three months, or a combination of the fine and imprisonment together. There is a provision for this penalty in Clause 4 . . .

. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

## Annex 2

### MALTESE NOTE VERBALE TO ITALY DATED 31 DECEMBER 1965

*[See* **I**, *p. 551, Memorial of Malta, Annex 65]*

## Annex 3

### DOCUMENTS RELATING TO CONCESSION NC 53: *(a)* EXTRACTS FROM HEADS OF AGREEMENT OF 14 APRIL 1974; *(b)* EXTRACTS FROM EPSA OF 13 OCTOBER 1974; *(c)* ACT NO. 58 OF 23 SEPTEMBER 1974, WITH ACCOMPANYING MAP; TRANSLATION; *(d)* EXCHANGE OF LETTERS BETWEEN THE LIBYAN MINISTRY OF PETROLEUM AND TOTAL, DATED 17 NOVEMBER 1974 AND 12 JANUARY 1975; *(e)* REDUCTION OF MAP PUBLISHED BY THE NOC IN 1975

### *(a)* EXTRACTS FROM HEADS OF AGREEMENT OF 14 APRIL 1974

### HEADS OF AGREEMENT

#### *Preamble*

As a result of discussions held in Tripoli, pursuant to the minutes of understanding signed in Paris on 20th February, 1974 by representatives of the Government of the Libyan Arab Republic and Compagnie française des pétroles, it was agreed upon the following principles:

1. (A) *Type of Contract:*

Petroleum Exploration and Production Sharing.

(B) *Parties to the Contract:*

(1) National Oil Corporation — General Corporation established in the Libyan Arab Republic according to Law No. 24 of 1970 and its amendments (First Party)

(2) Compagnie française des pétroles — a Corporation established under the Laws of France, acting for itself and for its affiliate, Compagnie des pétroles Total Libye (C.P.T.L.) (Second Party).

2. *Contract Area:*

It shall be made of:

Area A — Western Offshore Area — as described in Appendix IA.
Area B — Murzuk Basin Area — as described in Appendix IB.
Area C — Hamada Area — as described in Appendix IC.
Area D — Eastern Deep Offshore Area — as described in Appendix ID.

Each block shall have an approximate surface of 1,500 km except for Area D.

3. *Contract Duration:*

Thirty-five (35) years.

4. *Exploration Period:*

Shall be:

— for Area A — five (5) years,
— for Area B — six (6) years,
— for Area C — five (5) years,
— for Area D — five (5) years; as from the date of selection of the blocks retained in that area as provided in Appendix II.

At the end of the Exploration Period for each of the areas, only the blocks in such area in which a discovery . . .

. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

. . . below, if Second Party does not agree with a decision of the Committee on a development project which Second Party deems uneconomical, First Party may proceed with the project at its sole risk and expense and ask the operator to perform such operation, and the First Party shall enjoy the entire benefits deriving therefrom.

13. *Exploration Commitments:*

Second Party undertakes to carry out the work program outlined for each area in Appendix II as approved by the Management Committee.

Second Party undertakes to spend for such operations:

*(a)* Area A:

Minimum Commitments of 30 millions US $ for the first 6,000 square km.

for any area in excess of 6,000 sq. km. where TOTAL shall work after international boundaries have been agreed upon, commitments shall be 15 million US $ for each 3,000 sq. km.

Area A shall not exceed 22,000 sq. km.

*(b)* Area B not less than 30 million US $.
*(c)* Area C not less than 30 million US $.
*(d)* Area D 1 million US $ for seismic, and after the optional selection of block or blocks, 10 million $ for each block.

In the case of Area D the Exploration Period shall be extended as necessary to enable drilling to be conducted in a safe manner.

In the case of Area A the Exploration Period shall be extended by a period equal to the delay between the effective date and the final determination of the limit of Libyan jurisdiction affecting the said Area.

Should the geophysical works and the general geological studies and/or drilling information not result in a sufficient number of drillable prospects justifying such commitments, then additional area(s) shall be requested by the Second Party to the Libyan Government. Should such new area(s) not be granted or should the same, in Second Party's opinion and after serious consultations and review with the Supervisory Committee, not justify the undrilled exploration wells, then Second Party shall be released from any remaining obligations.

14. *Force majeure:* The usual clause.

15. *Arbitration:*

According to the Rules of the International Chamber of Commerce in Paris. The Board of Arbitration shall consist of three (3) Arbitrators.

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16. *Assignment of Rights:*

The assignment of any of the Second Party's rights and obligations under the agreement shall be subject to the Government consent.

It is noted that TOTAL intends to request such consent for the transfer of a part interest in one or more of the areas, to another oil company which would become partner with TOTAL as Second Party, being understood that TOTAL would remain responsible vis-à-vis First Party of Second Party's obligations.

The above principles shall be developed into a detailed Agreement which shall be finalized as soon as practical between the Parties' representatives and approved by a Libyan Law enacted for that purpose and in accordance with the applicable procedures in both countries.

Signed on this day 21st Rabi El-Awal, 1394 H., corresponding to the 14th April, 1974 A.D.

*for the Libyan Party*
*(Signed)* [ILLEGIBLE.]

*for C.F.P.*
*(Signed)* [ILLEGIBLE.]

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### *Appendix IA*

### WESTERN OFFSHORE AREA

The Area shall be the area comprised within a line made up of:

*(a)* On the one hand, the seaward limit of jurisdiction of the Libyan Arab Republic over the seabed and subsoil underlying any agreement between the Libyan Arab Republic and any other relevant Mediterranean State claiming jurisdiction over such seabed and subsoil, between the westernmost and the easternmost intersections of the said limit with the broken line defined in *(b)* below.

*(b)* On the other hand, that part of the continuous broken line defined hereafter which is comprised between the easternmost and westernmost intersections referred to in *(a)* above; that continuous broken line shall be made up of:

- (i) that part of the meridian of 14° 45′ longitude East, which is situated north of point A being its intersection with
- (ii) parallel 34° 10′ of latitude North, westward of point A up to point B being its intersection with
- (iii) meridian 13° 30′ of longitude East, southward of point B up to point C being its intersection with
- (iv) parallel 33° 50′ of latitude North, westward of point C up to point D being its intersection with
- (v) meridian 13° 05′ of longitude East, northward of point D up to point E being its intersection with
- (vi) parallel 34° 15′ of latitude North, west of point E.

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### *(b)* EXTRACTS FROM EPSA OF 13 OCTOBER 1974

## PETROLEUM EXPLORATION AND PRODUCTION SHARING CONTRACT

Between:

— *National Oil Corporation*, a General Corporation established in the Libyan Arab Republic according to Law No. 24 of 1970 and its amendments (hereafter called "NOC" or "First Party");

- *Compagnie des pétroles Total (Libye)*, a company established and organised under the laws of France being a wholly owned affiliate of Compagnie française des pétroles (hereafter called "TOTAL" or "Second Party"); and
- *Compagnie française des pétroles*, a company established and organised under the laws of France

*Whereas* representatives of the Government of the Libyan Arab Republic and of Compagnie française des pétroles have agreed in Paris in February 1974 on co-operation between them in the fields of petroleum activities including exploration for which an exploration contract was to be concluded as soon as possible;

*Whereas* certain principles for such an exploration contract have been discussed, agreed and recorded in Heads of Agreement signed by the Parties in Tripoli on the 21st Rabi El-Awal 1934 H. corresponding to 14th April 1974 A.D.;

*Whereas* NOC has the exclusive right and authority to explore for and develop petroleum in and throughout the Contract Area as hereinafter defined;

*Whereas* NOC is authorised and empowered by the Revolutionary Command Council of the Libyan Arab Republic to enter into this Contract;

*Now therefore it is agreed as follows:*

……

### *Article 3 — Contract Area*

3.1. The Contract Area shall initially consist of:

Area A: the Western Offshore Area as described in Appendix I.A.
Area B: the Murzuk Basin Area as described in Appendix I.B.
Area C: the Hamada Area as described in Appendix I.C.
Area D: the Eastern Deep Offshore Area as described in Appendix I.D.

3.2. No later than eighteen (18) months after the Effective Date, Second Party shall have the option, by notice to First Party, to designate within Area D as defined above up to three blocks defined by portions of meridians and parallels, of an aggregate areal extent of no more than thirty thousand (30,000) square kilometers.

Area D, except for areas so designated, shall cease to form part of the Contract Area on the expiry of such 18 months period.

3.3. At the end of the Exploration Period in respect of any Area, the said Area shall be reduced to those Blocks within which a discovery has been made or a discovered field, structure or trap extends. All other Blocks in said Area shall cease to form part of the Contract Area.

3.4. The Contract Area may be increased by the inclusion therein of additional areas as provided in Article 5.3. below.

……

### *Article 19 — Effective Date and Term*

19.1 This Contract shall take effect when it shall have been signed by duly authorized representatives of First Party, Second Party and Compagnie française des pétroles and approved by a Libyan Law enacted for such purpose.

This Contract shall terminate, except for extensions due to Force Majeure as provided in Article 15, on the thirty-fifth anniversary of the Effective Date.

Done in Tripoli on the 27th Ramadan 1394 H.
corresponding to the 13th October 1974 A.D.

For Compagnie française des pétroles,

*(Signed)* [ILLEGIBLE.]

For Compagnie des pétroles TOTAL (Libye),

*(Signed)* [ILLEGIBLE.]

For National Oil Corporation,

*(Signed)* [ILLEGIBLE.]

---

### *Appendix I*

### DEFINITION OF AREAS

### A — WESTERN OFFSHORE AREA

The Area shall be the area comprised within a line made up of:

*(a)* On the one hand, the seaward limit of jurisdiction of the Libyan Arab Republic over the seabed and subsoil underlying the Mediterranean Sea as established by or pursuant to any agreement between the Libyan Arab Republic and any other relevant Mediterranean State claiming jurisdiction over such seabed and subsoil, between the westernmost and the eastern intersections of the said limit with the broken line defined in *(b)* below.

*(b)* On the other hand, that part of the continuous broken line defined hereafter which is comprised between the easternmost and westernmost intersections referred to in *(a)* above; that continuous broken line shall be made up of:

- (i) that part of the meridian of 14° 45′ longitude East, which is situated north of point A being its intersection with
- (ii) parallel 34° 10′ of latitude North, westward of point A up to point B being its intersection with
- (iii) meridian 13° 30′ of longitude East, southward of point B up to point C being its intersection with
- (iv) parallel 33° 50′ of latitude North, westward of point C up to point D being its intersection with
- (v) meridian 13° 05′ of longitude East, northward of point D up to point E being its intersection with
- (vi) parallel 34° 15′ of latitude North, west of point E.

This Area shall be subdivided into blocks by such portions of the following meridians and parallels which are included in the Area under the Libyan Arab Republic jurisdiction:

| *Meridians* | *Parallels* |
|---|---|
| 12° | 33° 50′ |
| 12° 15′ | 34° 10′ |
| 12° 30′ | 34° 30′ |

| | |
|---|---|
| 12° 45′ | 34° 50′ |
| 13° | 35° 10′ |
| 13° 15′ | 35° 30′ |
| 13° 30′ | 35° 50′ |
| 13° 45′ | |
| 14° | |
| 14° 15′ | |
| 14° 30′ | |
| 14° 45′ | |

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## (c) ACT NO. 58 OF 23 SEPTEMBER 1974, WITH ACCOMPANYING MAP; TRANSLATION

*(Unofficial translation)*

Libyan Arab Republic
*Official Gazette*

No. 66 3 AL-HEJJA 1394,
Corresponding to 17 December 1974

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Published by order of the Minister of Justice

No. 66 *Page 2847*

### LAW NO. 58 OF 1974

### APPROVING EXPLORATION AND PRODUCTION SHARING AGREEMENTS AS BETWEEN THE NATIONAL OIL CORPORATION AND CERTAIN OIL COMPANIES

*In the Name of the People,*
*The Revolutionary Command Council,*

Having regard to

The Constitutional Declaration of 2 Shawal 1389, corresponding to 11 December 1969;

The 1955 Petroleum Law No. 25 of 1955, and its amended laws;

Law No. 24 of 1970 establishing the National Oil Corporation and its amended laws;

Law No. 8 of 1974 approving an exploration and production sharing agreement between the National Oil Corporation and Occidental (Libya) Co. S.A., and;

Having regard to what has been submitted by the Minister of Petroleum in his memorandum dated 9 Jumada AL-ULA 1394, corresponding to 30 May 1974, and to the approval of the Council of Ministers,

*Has promulgated the following law:*

### *Article 1*

Exploitation of areas illustrated in the annexed chart and in the exploration and production sharing agreements between the National Oil Corporation and the following oil companies has been agreed upon:

1. The French Petroleum Company and its subsidiary Total (Libya) Petroleum Company;
2. Esso Libya S.A.;
3. Mobil Oil (Libya) Ltd.;
4. AGIP Company S.A.;
5. Petrobras International Company S.A. Braspetro.

And that is according to conditions specified in the memorandum of the Minister of Petroleum referred to above.

### *Article 2*

The Minister of Petroleum is authorized to take the necessary measures to complete the detailed and final Agreements between the National Oil Corporation and the companies referred to in the preceding article. He may delegate any official of the Ministry of Petroleum, the National Oil Corporation or any of its subsidiaries, to sign such agreements.

### *Article 3*

The Minister of Petroleum shall implement this law which enters into force as of the date of its promulgation. It shall be published in the Official Gazette.

The Revolutionary Command Council

Izziddin AL-MABROUK,
Minister of Petroleum.

Major Abdussalam Ahmad JALLOUD,
Prime Minister.

Issued on 7 Ramadan 1394
23 September 1974

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## (d) EXCHANGE OF LETTERS BETWEEN THE LIBYAN MINISTRY OF PETROLEUM AND TOTAL, DATED 17 NOVEMBER 1974 AND 12 JANUARY 1975

Libyan Arab Republic
Ministry of Petroleum
P.O. Box 256, Tripoli.

Tripoli, 3rd. Zul Keda, 1394 H.Y.
Corresponding to the 17th Nov., 1974.

Messrs. Compagnie française des pétroles — TOTAL
39-43, Quai André Citroën
75739 Paris-CEDEX 15
France.

Kindly be informed that the Revolutionary Command Council of the Libyan Arab Republic has on the 29th Shawwal, 1394 H.Y. corresponding to the 13th November, 1974, promulgated a Law ratifying the terms and conditions of the agreement concluded on the 27th Ramadan, 1394 H.Y., corresponding to the 13th October, 1974 between the Ministry of Petroleum, acting on behalf of the National Oil Corporation and your Companies.

You are hereby notified accordingly so as to commence the implementation of your commitments.

Yours faithfully,

*(Signed)* Hussein ABDINE,
Legal Advisor,
Ministry of Petroleum.

---

Mr. Hussein Abdine
Legal Advisor
Ministry of Petroleum
P.O. Box 256, Tripoli.

Tripoli, le 29 Thoul Haja 1394,
12 January 1975.

Dear Sir,

We thank you for your letter of 17 November 1974, in the course of which you informed us that a law had been promulgated ratifying the agreement entered into between the Ministry of Petroleum and our Company on 13 October 1974.

This law was published in the official gazette on 17 December 1974.

We take it that on a proper interpretation of the contract the "Effective Date" is the date of such publication.

As far as we understood it correctly, it was our same understanding when we discussed the matter in your office on 8 January 1975.

In the absence of advice from you to the contrary, therefore we shall regard the date of such publication as the effective date of the contract and shall act accordingly.

Yours faithfully,

*(Signed)* P. RONDEAU.

---

### *(e)* REDUCTION OF MAP PUBLISHED BY THE NOC IN 1975

*[Not reproduced]*

## Annex 4

## EXTRACTS FROM MALTESE PARLIAMENTARY DEBATES, 16 JANUARY 1978; TRANSLATION

### STATEMENT

### AGREEMENT WITH THE OIL COMPANIES REGARDING THEIR POSITION UNTIL THE SITUATION BETWEEN MALTA AND LIBYA IS RESOLVED

The Hon. Dom Mintoff: On the 7th December, 1977, after many months of negotiation, agreement was finally reached with the three companies who were given a licence to drill for oil towards the south of the Maltese Islands. This special agreement was made necessary because of the disagreement between Malta and Libya regarding the median line which separates the two countries.

All the companies who had been given a licence to drill for oil agreed that the matter had to be resolved by the International Court; so much so, that agreement was reached with two of these companies before the Special Agreement with Libya of the 23rd May, 1976 was signed. This Agreement was placed before the House in the statement of the 24th May, 1976.

Although the companies were in agreement regarding the International Court, the details regarding changes to the licence, the talks were not finalised with them all in a short time. One should not be surprised at the lengthy proceedings if the Government's aim in these negotiations is understood. This was that whilst the Maltese Government allowed the companies to postpone those undertakings that could not be effected before the case between Malta and Libya was resolved, at the same time would force these companies to satisfy the other undertakings which were not tied to the drilling of oil proper.

The agreement now reached between all the companies states that prospecting for oil will be stopped pending the decision of the International Court regarding the extent of the Maltese continental shelf, thus ensuring that any future prospecting will be conducted in our (Maltese) waters. The companies want to know what will happen should the International Court decide that the median line is not that which Malta maintains. Consequently we had to foresee what changes to the licences would be required should the International Court not decide wholly in our favour.

The new agreement made it clear that irrespective of the Court's decision, all monies which had been paid to Malta would be retained by Malta and Malta would not refund any money neither would it forfeit those sums which fall due for payment during the period of the disagreement.

The Agreement re-enforces that part of the original agreement which bound the companies to invest in industrial projects in Malta. These changes have not been effected because of the disagreement between Malta and Libya, but because of difficulties encountered by these same companies in investing in industrial projects in Malta. We ourselves have encountered these same difficulties, as can be said of the whole World, because of the recession.

Notwithstanding, the Government made sure that whilst it was not possible to create the desired number of jobs for the people of Malta, they would reap other benefits.

The agreement made with the consortium run by Aquitaine regarding investments did not raise any problems. Not only did they set up the proposed factory but it is being run in accordance with the agreement and is making progress.

Texaco fulfilled its undertaking to appoint "consultants" in an endeavour to establish which industries could be profitably set up in Malta. In November 1974 Stanford Research Institute made a long report to Texaco and the Malta Development Corporation in which the necessary advice was given as well as naming the American companies who had shown interest in setting up industries in Malta. Because in the past years trade between countries was reduced (there was the "recession") every effort of Texaco and the Malta Development Corporation to set up industries came to nothing.

Therefore, we agreed with Texaco that out of the unspent sum, which amounted to 2.8 million American dollars, the sum of 1 million dollars would be paid immediately to the Government to be spent as it thought fit, and the balance would be retained by Texaco to be invested by this company in an industrial project of the Maltese Government's choice. This money will be expended as soon as we have a worthwhile project in which we wish Texaco to invest. In the meantime, we have kept this money as a reserve, as we had other means on which to draw.

Joc Oil's problems were more complicated and difficult, and they took longer. Joc Oil's undertaking was precise: it was to invest in a cement company costing approximately 35 million American dollars. After careful study made by the company, it was found that the project would not be a profitable one, principally because of the high cost of oil.

Despite the considerable effort made in an endeavour to find an alternative project to take the place of the cement project, nothing was achieved. After months of negotiations, Joc Oil agreed to give to the Government the sum invested in the cement project. This sum, together with accrued interest, was approximately Lm580,000. This sum was placed in Malta's treasury to meet the needs of its people.

It is therefore clear that, despite the delay in oil exploration because of the disagreement with Libya, and despite the problems which the oil companies had to face in their efforts to set up industries, not only did the Government not remain passive, but it took all the necessary steps to obtain for the people of Malta as much as possible. Notwithstanding that circumstances were all against us, the people of Malta succeeded in obtaining an appreciable sum.

I know how much the people of Malta would like oil exploration in our waters to be resumed as soon as possible. I know how beneficial to the people of Malta this oil exploration would be. However, I also know that if oil exploration is not undertaken in a peaceful climate, it would be a cause of harm to us. Therefore, whilst I promise that we will do everything possible to urge our friendly Government of the Libyan Jamahiriya to hurry up and ratify the agreement to go before the International Court, I also want to warn our people not to allow themselves to be misled on the matter without understanding how, even amongst countries of the West who are the best of friends, it took years to resolve peaceably matters of this nature. When disagreement ended in quarrels, everyone was the loser.

I hope that in a short time I will be able to give information which will be to the good of the Maltese people regarding the matter between Malta and Libya. *(Applause)*

. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .

## Annex 5

### SEISMIC PROFILES OF THE MEDINA AND MALTA CHANNELS: MEDINA CHANNEL (OR GRABEN) ALONG LINE MS14, AFTER FINETTI; MEDINA GRABEN (MIOCENE TO QUATERNARY RIFTING) ALONG LINE MS14, FINETTI (1984); MEDINA-MALTA CHANNEL (SEE FIGS. 7 AND 9B, JONGSMA, *ET AL.* (1984))

*[Not reproduced]*

## Annex 6

### EXTRACTS FROM DERK JONGSMA[1], JAN E. VAN HINTE[1] AND JOHN M. WOODSIDE[2], "GEOLOGIC STRUCTURE AND NEOTECTONICS OF THE NORTH AFRICAN CONTINENTAL MARGIN SOUTH OF SICILY", SUBMITTED FOR PUBLICATION, 1984: PAGES 1, 11, 14 AND 15; FIGURE 1: SIMPLIFIED TECTONIC FRAMEWORK OF THE MEDITERRANEAN REGION

*[Page 1]*

*Abstract*

Marine geological and geophysical data together with drilling information indicate that the North African passive continental margin has been subjected to extension and wrenching after it collided with the northern part of Sicily.

The area of the Tripolitania Basin, Jarrafa Trough, Melita and Medina Bank and the Ragusa-Malta Plateau formed part of a sinking passive margin since the dispersal of Gondwanaland at about 180 Ma as observed from geohistory diagrams. A record of rifting in a NW-SE direction accompanied by dextral shear along the southern troughs is observed in seismic reflection data. The rifting started during the Neocomian and lasted until the Eocene when activity became minor.

A pre-Middle Miocene period of northward subduction of oceanic crust is inferred from the geology in NE Sicily. Uplift of the northern part of the African margin after collision in the Middle Miocene is seen in wells in southern Sicily. After the Messinian a rift and dextral shear zone established itself across the African Margin from the Strait of Sicily to the Medina Ridge in the Ionian Basin. The zone is marked by up to 1.7 km deep grabens, narrow active wrench faulted channels, volcanic fissures and local uplifted "Keilhorsts" such as Malta.

*[Page 11]*

changing in polarity. A two stage development of fault tectonics in the Sicily Channel as envisaged by Winnock (1979) conforms with this change in the general pattern of faulting. The first extensional phase caused a complex field of faults and tilted blocks. The later wrenching phase caused many of these faults to lock while major vertical motion continued along others (Jackson and McKenzie, 1983) causing the deep grabens.

In response to or just prior to the wrenching, the Medina Bank appears to have rotated clockwise. This would explain the peculiar NNW trend of the disturbed fault zone seen along the southwest flank of Medina Bank (Figs. 7c, 8b and 16) and the NNE trend of the Medina Escarpment and of the top of the bank as shown by the 200 m bathymetric contour (Fig. 2). The structural pattern of the Medina Ridge is also typical of an East West dextral shear. Individual ridges have a NE-SW trend being the expected axis of folding and reverse faulting (i.e. compressional features) suggesting continuation of the wrench zone into the Ionian Sea (Woodside and Jongsma, in prep.).

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[2] Lyngby Geophysical Services, 46 Lyngby Ave, Darthmouth, N.V., Canada.

### *Basal Pliocene Surface Map*

The difference between the underlying structure of the area south and north of Medina and Melita Bank is well displayed by a map of the depths to the "M" reflector. The contour map on the base of the Pliocene (i.e. "M" reflector) presented in Figure 17, illustrates two contrasting topographies on this horizon. To the south of 35° N over the Jarrafa Trough and Tripolitania Basin the contours reflect the erosional effects of a river system at the end of the Messinian. In the area of Sicily Strait and between the Medina and Malta Platform the contours clearly show the effect of post Pliocene structural changes superimposed by faulting of the "M" reflector.

### *Volcanism*

Volcanism is closely associated with the active phase of faulting north of the Tunisia Plateau (Fig. 4). The volcanic islands of Linosa and Pantelleria lie on NW-SE trending faults through which lava was extruded and along which the islands have elongated (di Paola, 1973). These faults do not appear to be the boundary faults for the grabens (e.g. volcanoes on Linosa and Pantelleria are on the bordering highlands and in the centre of the graben, respectively). N-S

*[Pages 14-15]*

from Tunisia (Caire, 1977; Illies, 1981) to the Medina Ridge in the Ionian Sea. The pattern of faulting derived from tracing active faults in seismic profiles across this zone, shows all three general styles of faulting which have been recognized to be associated with wrenching (Wilcox *et al.*, 1973). In the area of the Pantelleria, Linosa and Malta Troughs, divergent wrenching is seen resulting in deep grabens perpendicular to the main tensional axis of the strain ellipse. The zone narrows between the Malta Plateau and Medina Bank and the style is simple parallel wrenching producing uplift of "keilhorsts" such as Malta. Crustal blocks such as Medina Bank appear to have been rotated during the early phase of wrenching. Presently flower structures are being produced in this zone. The eastern part of the wrench zone in the Ionian Sea, the Medina Ridge is typical of convergent wrenching with folds forming parallel to the main tensional axis of the strain ellipse and normal faulting perpendicular to this trend (Fig. 16).

The geophysical data summarized in this paper is consistent with the above interpretation and supports the contention that a sliver of the African Margin including southern Sicily is moving eastward relative to Africa. Crustal structure investigation and Bouguer gravity anomalies show that extension is pronounced in the Strait of Sicily where crustal thickness has been reduced to about 20 km. Present seismicity is at a low level and within the top 10 km of the crust. A poorly constrained fault plane solution within the Wrench Zone supports dextral shear motion. Paleomagnetic data (Besse *et al.*, 1981) from the Ragusa Malta Plateau in Sicily show anticlockwise rotation of Sicily by up to 10° with respect to Africa since the Pliocene. Prior to this Sicily moved with Africa.

The most convincing evidence in our minds for a deepseated crustal fracturing is the presence of alkaline volcanoes within the rifts and on southern Sicily. The short wavelength magnetic anomalies within the wrench zone SE of Malta indicate that volcanic material may also be entering the fractures caused by the wrenching within the Medina Malta Channel. Longer wavelength anomalies over a large part of the Pelagian Sea are related to older Cretaceous and Jurassic periods of volcanic activity, of which the products were encountered during drilling in the Tripolitania Trough and on Sicily.

Relief on the Messinian erosional surface conclusively shows that major vertical motions due to faulting in the Pelagian Sea took place after the Messinian. Most of this faulting is located north of 35° N and is associated with the wrenching. The surface mapped shows an eroded river system within the Tripolitania and Jarrafa troughs. Subsequent deposition has smoothed out the bathymetric contours in this region.

## *Conclusions*

The tectonic development of this portion of the north African margin began with rifting and subsequent drifting about 180 Ma ago. Normal development of the passive margin was modified in the south by Neocomian to Eocene rifting of a failed arm of the Sirte Triple Junction and by Eocene to Middle Miocene subduction in the north. Dextral shearing in the southern Tripolitania Basin was probably a reaction to the change in relative motion between Europe and Africa (Dewey *et al.*, 1973). Northern subduction terminated with the collision of major alpine fragments with North Africa from the Grande Kabylie to Calabria (e.g. Cohen *et al.*, 1980; Alvarez *et al.*, 1974). This initiated the latest period of tectonic activity and broke the Pelagian area in a passive southern platform attached to Africa and a separate fractured mobile terrane north of the Tunisian Plateau and Medina Bank. The neotectonics north of 35° can be described by uplift of Sicily and dextral shearing of the east to southeast moving Sicilian-Calabrian block with respect to Africa. This movement, of what might be considered a microplate between the African and European plates, is similar to that of the Aegean microplate, both of which are apparently consuming from different directions what remains of the oceanic part of the Ionian Basin. Brittle fracture of the African margin through the central Pelagian Sea is a response to post-collision uplift and the shear stresses posed on this region by differential horizontal plate consumption.

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# Annex 7

## EXTRACTS FROM I. R. FINETTI, "GEOPHYSICAL STUDY OF THE SICILY CHANNEL RIFT ZONE", 1984: FIGURE 13: RESIDUAL GRAVITY MAP OF THE PELAGIAN SEA (PAGE 18); FIGURE 15: COMPARISON OF RIFTING IN THE RED SEA AND THE SICILY CHANNEL RIFT ZONE (PAGE 20); PAGES 3, 9 AND 27

BOLLETTINO DI GEOFISICA TEORICA ED APPLICATA Vol. XXVI, N. 101 - Marzo 1984

I. FINETTI

# GEOPHYSICAL STUDY OF THE SICILY CHANNEL RIFT ZONE

**Summary.** The Sicily Channel area of the Pelagian Sea, running generally along the Pantelleria, Linosa and Malta Troughs and the Malta and Medina Channels to the Heron Valley, constitutes a prominent rift zone. The rifting process has produced a remarkable uplifting of the Mantle and crustal thinning in a ridge area associated with a distinct positive gravity anomaly axis (axial ridge). This axial ridge is continuous along a line which includes the Pantelleria volcano, the Linosa Graben and the Medina Graben.

The first rift movements commenced in the Early Pliocene (or Late Miocene) and continued with high intensity until the Late Quaternary; then they decreased but remain still active at the present time. The Sicily Channel Rift Zone (SCRZ) reaches a maximum width of about 100 km in the central part where a total pull-apart amount of 17-18 km has been computed. Its dimensions are less at the two extremities.

A combined pull-apart and strike-slip model is proposed. This model is based on the view that in the areas of Cape Bon on the west and the Medina Graben on the east strike-slip movements prevail over pull-apart movements.

**Received** November 5, 1983

## 1. Introduction

The Pelagian Sea is generally characterized by large areas having flat or slightly deformed sea-bed morphology. However, cutting across the sea-bed of the Pelagian Sea from the Egadi Valley to the Heron Valley are the huge troughs of Pantelleria, Linosa and Malta and the Medina and Malta Channels. The ensemble of these troughs and channels constitutes a distinct and unique geomorphological province that, with differing widths and varying water depths, crosses with continuity the entire Pelagian Sea. This part of the Pelagian Sea is given in this paper the name "Sicily Channel"; the geological phenomenon manifested by these sea-bed features is referred to there as the "Sicily Channel Rift Zone" (or in abbreviated fashion as the "SCRZ").

More than a decade ago the first modern geophysical investigation of the Pelagian Sea (Finetti and Morelli, 1972) and in particular the seismic reflection exploration conducted by the OGS of Trieste showed that the Sicily Channel zone of the Pelagian Sea is characterized by huge tectonic deformation with numerous normal faults and collapse of blocks. Since these earlier studies, it has become clear that this area has been affected by a prominent rifting process which remarkably deformed the previously existing quiet tectonic conditions. More detailed observations revealed that this tectonic fragmentation is due to a young geodynamic process, still active. The knowledge of this crustal deformation is of importance to an understanding of the latest geodynamic movements of the Central Mediterranean. The main sources for a reconstruction of the

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relatively low gravity anomalies in troughs lateral to an axial ridge is quite normal and frequent in a rift area (i.e. the Red Sea).

The gravity map (Fig. 13) clearly indicates the area of the SCRZ and the position of the axis of maximum uplift and crustal thinning. The length and the axis of the uplift are well outlined by the continuity of the gravity anomalies across the whole Pelagian Sea. Such evident continuity cannot be found elsewhere in the Pelagian Sea.

d) Utilizing all the numerous available geophysical data, it is possible to reconstruct the regional structural setting of the SCRZ shown in Figs. 18 and 19. Due to the small scale used, only the main faults, without the time-structural contour lines, have been plotted. The SCRZ is shown in grey. In the sector of the SCRZ running from Pantelleria to Linosa up to the seismic line MS-19, the rifting process has produced the maximum extensional effects with extrusion of the major basaltic shows (Pantelleria, Linosa, Bannock, etc.). From line MS-19 to the area of the Medina Graben shown in Fig. 7 (this figure shows only the axial part of the much wider fragmented area of the Medina Graben), the fault intensity and the width of the fractured area commences to diminish considerably. In the eastern part of the SCRZ, from roughly 15° longitude east to the Sicily-Malta Escarpment (16° longitude), the seismic sections show subvertical faults with deformational characters that are indicative of strike-slip movements or of a combination of strike-slip and vertical movements.

This appears evident both for the Medina Graben (Fig. 8) and for the eastern extension of the Malta Graben (Fig. 9). The strike-slip faults shown on the structural maps (Figs. 18 and 19) are trending W-E (or WSW-ENE) according to the existing physiographic shape.

To reconstruct the observed and/or the extrapolated or inferred deformational pattern at the northwestern extremity of the SCRZ, where the pull-apart components of the movements also become less, it is necessary to examine carefully the structural elements of the area from Cape Bon in Tunisia to Pantelleria and to the Adventure Plateau (Fig. 19). The structural details of this part of the Pelagian Sea have been published some years ago (Winnock, 1979; 1981).

North of Pantelleria the large Pantelleria Trough continues east of the Adventure Plateau with a very consistent reduction in number of faults and in the width of the extended area. The structural picture indicates the presence of NNW-SSE (nearly N-S) faults and, from Cape Bon to Pantelleria, some W-E accentuated features that suggest the existence of strike-slip deformation components.

e) During the geodynamic phase which generated the SCRZ, other parts of the Pelagian Sea were affected by much smaller stretched zones which created some troughs, such as the Lampedusa Trough (Fig. 11) and the Jarrafa Trough (Fig. 10). These second-order troughs cannot be compared in terms of magnitude and crustal significance with the first-order rift of the SCRZ. An immediate comparison of the different order of rifting existing between the SCRZ and these lesser troughs can be seen in the structural geological cross-section of the Pelagian Sea published by Winnock (1979; 1981) (Fig. 12).

## 3.2. Time analysis of the rifting process in the Sicily Channel

From the seismic reflection data and from the geological data of the dredged samples reported in literature, it is possible to establish the geological time during which the rifting process of the SCRZ took place. These data, particularly the seismic data, furnish several clear indications regarding the time of occurrence of the rifting in the Sicily Channel area.

A number of extensional faults have affected the sea-bed surface (Figs. 4, 5 and 6), which clearly indicates that the rifting process here is young and still active. In the Malta Trough (Fig. 4), there is clear evidence that some faults are not affecting the uppermost

From a comparison of the data, it is of interest to note that in the SCRZ the deformational process, in terms of crustal stretching, is of the order of almost one-third that of the Red Sea rift zone.

## 4. Proposed model for the Sicily Channel Rift Zone

Taking into account all the observed deformational data above described, it is now possible to construct a rift model. It is immediately evident that a simple pull-apart model does not explain the reconstructed deformational pattern.

The results of a critical analysis of the possible applied stretching forces and observed deformational components are shown in Fig. 17. In the upper part of the figure, at the northeastern boundary of the SCRZ (grey area), the varying amount of the total pull-apart deformation calculated from the seismic lines is plotted (dashed area). The width of the area is proportional to the computed total pull-apart. Following the obtained data, and restricting the SCRZ to the pull-apart calculated to have occurred between PR (Present time) and PL (Early Pliocene, beginning of the rift process), the pre-rift conditions, modified by the pull-apart components, can be computed.

As above mentioned, evidence of strike-slip components are observed. It seems evident that the first-order strike-slip faults take a W-E direction. This is in accordance with the more generale deformational pattern observed in offshore northern Sicily and in the southern Tyrrhenian Sea. Some strike-slip faults of NE-SW direction are also inferred, but these are, most probably, of second-order significance as compared to those trending W-E.

Assuming the direction of the stretching geodynamic force and the deformational components of the pull-apart and strike-slip movements indicated in Fig. 17, it is possible to propose the combined pull-apart and strike-slip rift model shown in the lower part of the same figure. This model fits very well all the observed deformational data and the calculated total pull-apart movements of the SCRZ.

The rifting process in the SCRZ, though quite recent in comparison to the rifting in the Red Sea, for example, has already produced a huge fragmentation of the crust along the SCRZ and a prominent Mantle uplifting and crustal thinning. Hence, it is possible to delineate the tectonic separation of a Sicilian microplate, which includes the Adventure Plateau and the Ragusa-Malta Plateau, from the African megaplate.

## Annex 8

COMPARISON OF THE MEDINA CHANNEL AND THE JERRAFA TROUGH: LOCATION MAP; PROFILES

*[Not reproduced]*

## Annex 9

BATHYMETRIC PROFILES: *(a)* BATHYMETRIC PROFILES PREPARED UNDER THE DIRECTION OF PROFESSOR F. FABRICIUS: LOCATION MAP; PROFILE A; PROFILE B; *(b)* BATHYMETRIC PROFILES PREPARED BY THE LAMONT-DOHERTY GEOLOGICAL OBSERVATORY UNDER THE DIRECTION OF DR. W. B. F. RYAN: FROM RAS AJDIR TO GOZO ALONG THE WESTERN EDGE OF THE MALTESE TRAPEZIUM; FROM GOZO ALONG THE EASTERN EDGE OF THE MALTESE TRAPEZIUM TO ITS INTERSECTION WITH THE MALTESE EQUIDISTANCE LINE. BOTH SETS OF BATHYMETRIC PROFILES ARE BASED ON DATA DERIVED FROM THE IBCM

*[Not reproduced]*

## Annex 10

### CERTIFICATION

I, the undersigned, Abdelrazeg El-Murtadi Suleiman, Agent of the Socialist People's Libyan Arab Jamahiriya, hereby certify that the copy of each document attached as an Annex in the Reply submitted by the Socialist People's Libyan Arab Jamahiriya is an accurate copy; and that all translations are accurate translations.

*(Signed)* Abdelrazeg EL-MURTADI SULEIMAN,
Agent of the Socialist People's
Libyan Arab Jamahiriya.

# REPLY OF THE REPUBLIC OF MALTA

# RÉPLIQUE DE LA RÉPUBLIQUE DE MALTE

# INTRODUCTION

1. This is the Reply of the Republic of Malta filed pursuant to the Order made by the President of the Court on 21 March 1984.

2. The Reply, which is divided into six Parts, is intended primarily to rebut the arguments of the Socialist People's Libyan Arab Jamahiriya tending to distort the geographical and legal framework of the present case. The Reply, therefore, also restates the principles and rules of international law which, in the view of Malta, are applicable for the purposes of the delimitation of the continental shelves of Malta and Libya. These are preceded by an opening Part in which Malta deals with some preliminary points arising out of Part I of the Libyan Counter-Memorial.

# PART I

## SOME FACTUAL ELEMENTS

### INTRODUCTION

3. The Libyan Counter-Memorial deals in Part I, under the heading of "The Factual Elements", with three matters: (1) the background to the dispute; (2) the physical factors of geography, geomorphology and geology; and (3) economic and other considerations introduced by Malta. The second of these matters – the physical factors – will be dealt with in Parts II and III below. The first and third of these matters will be dealt with in the present Part.

4. This Part will not attempt to restate the whole of Malta's position regarding the background to the dispute and the economic and other considerations. The nature of the items under reply calls for an approach which is necessarily selective. On the whole, this Part of the Reply will follow the headings of Part I, Chapters 1 and 3, of the Libyan Counter-Memorial. However, the fact that Malta does not in this Reply deal with every allegation of fact made by Libya which may call for comment or qualification should not be regarded as meaning that Malta accepts the correctness or validity of all that is said in the Libyan Counter-Memorial. Should the Libyan Reply, or statements which Libya may make during the Oral Hearings, indicate that other matters require comment, Malta reserves the right to deal with them at the latter stage.

# CHAPTER I

# THE BACKGROUND OF THE DISPUTE

## 1. LEGISLATION

5. In the opening Chapter of the Libyan Counter-Memorial some attention is devoted to what is described as Malta's "'*status quo*' contention, the total invalidity of which is apparent".[1]

6. Libya asserts, first, that "Malta has chosen to ignore the effect of the Libyan legislation of 1955 which patently did not respect 'the equidistance line' for the northern boundary of Libyan continental shelf jurisdiction in the direction of Malta".[2]

7. The fact is that non-recognition by Libya of an equidistance line for the northern boundary of its continental shelf is by no means evident from a consideration of that legislation.[3] The relevant provision of the Petroleum Law of 1955 is Article 4, entitled "Boundary". It provides that the Law shall

> "extend to the seabed and subsoil which lie beneath the territorial waters and the high seas contiguous thereto . . . under the control and jurisdiction . . . of Libya".

It adds that if there is doubt as to the boundary of the zone it shall be determined by the Petroleum Commission. There is thus nothing in the legislation which suggests non-acceptance of an equidistance line as the northern boundary of the Libyan continental shelf. Libya simply did not determine that boundary, but left it open – thus providing no overt "opposition" to any claim which Malta might make.

8. Nor was the matter made any clearer by Libya's Petroleum Regulation No. 1 of 1955.[4] In defining in Article 2 the "First Zone", the Regulations stated that it

> "consists of the Province of Tripolitania bounded on the North by the limits of territorial waters and high seas contiguous thereto under the control and jurisdiction of . . . Libya . . .".

The description of the Second Zone also contained identical words relating to Cyrenaica. The accompanying sketch map[5] merely shows land boundaries stretching northwards into the Mediterranean, but the projection does not go anywhere near the equidistance line at those longitudes. This is certainly no indication that Libya was seeking to assert a claim even to an equidistance line, let alone to a line lying north of an equidistance line.

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[1] Libyan Counter-Memorial, p. 9, para. 1.02.

[2] *Ibid.*, pp. 9-10, para. 1.04.

[3] Libyan Petroleum Law, 1955, Libyan Memorial, Annex 32.

[4] Libyan Memorial, Annex 33.

[5] *Ibid.*, at end of Arabic text.

9. It appears that apart from actions specifically taken in relation to its litigation with Tunisia and Malta and the boundary implications of its grant of concessions, Libya has never given any publicity to any claim to continental shelf boundaries. No statement regarding Libya's position appears, for example, in the volumes of the United Nations Legislative Series containing "National Legislation ... relating ... to the Continental Shelf... ",[1] whereas Malta's legislation of 1966 – containing a reference to the median line – appears in the United Nations volume for 1974, having been communicated to the United Nations in 1972.[2]

10. Libya further asserts that "the plain fact is... that... [Malta's] 1966 Continental Shelf Act... did not call for any reaction on the part of Libya" and observes that "Malta did not notify the 1966 Continental Shelf Act to Libya".[3] The assertion assumes that notification is called for. But in international law there is no such obligation. As the Court has itself observed in the *Norwegian Fisheries* case the duty rests on the State which may be affected by adverse legislation to keep itself informed of such legislation and to react promptly to it.[4] In any event, there is no room for any suggestion that Libya could have been unaware of Malta's reliance upon the equidistance approach. In truth, "the plain fact" is that as early as 5 May 1965 Malta had addressed to Libya a Note Verbale informing Libya of Malta's intention to adhere to the 1958 Convention on the Continental Shelf and to be guided by the equidistance provisions of Article 6(1). As pointed out in the Maltese Counter-Memorial, this Note concluded with the words:[5]

> "the Government of Malta will be grateful to know that the Government of Libya is in full accord with this determination".

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[1] See, for example, ST/LEG/SER. B/15 (1970) or ST/LEG/SER. B/16 (1974).

[2] *National Legislation and Treaties relating to the Law of the Sea*, ST/LEG/SER. B/16, p. 156.

[3] Libyan Counter-Memorial, pp. 10–11, para. 1.06.

[4] The relevant passage of the Judgment of the Court is so striking as to merit quotation:

> "The United Kingdom Government has argued that the Norwegian system of delimitation was not known to it and that the system therefore lacked the notoriety essential to provide the basis of an historic title enforceable against it. The Court is unable to accept this view. *As a coastal State in the North Sea*, greatly interested in fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, *the United Kingdom could not have been ignorant of the decree of 1969* which had at once provoked a request for explanations by the French government. *How, knowing of it, could it have been under any misapprehensions as to the significance of its terms* ..." (*I.C.J. Reports, 1951*, pp. 138–139. Emphasis supplied).

[5] Maltese Counter-Memorial, p. 85, para. 183.

And Malta followed this up on 19 May 1966 by sending to the Secretary-General of the United Nations a declaration giving notice of succession to the Geneva Convention on the Continental Shelf and thus publicly proclaimed that its position regarding the boundaries of its continental shelf would be determined within the framework of Article 6 of that Convention.

### 2. EXCHANGES BETWEEN THE PARTIES IN 1972–73

11. Libya appears to consider it material to mention what it cares to call "the mystery surrounding 'Malta's baselines'".[1] The fact that Libya finds it appropriate to make something of this point is perhaps more significant than the point itself. The precise delineation of Malta's baselines has never been a relevant issue between the Parties. Certainly that delineation is a material fact in so far as the equidistance line between Malta and Libya is to be measured, on Malta's side, from those baselines. But the elements in it were identified to Libya's representatives in July 1973, as is evident from the fact, acknowledged by Libya in paragraph 1.10 of its Counter-Memorial, that discussion took place regarding the position of Filfla, upon which there are three basepoints, Nos. 22, 23 and 24. In no subsequent discussions did Libya indicate any difficulty from any supposed uncertainty regarding Malta's baselines. The lines are clearly set out in Map No. 2 in Vol. III (Maps) of Malta's Memorial.

12. Contrary to Libya's contention in paragraph 2.35 of its Counter-Memorial, Malta has not presented its baselines for the purpose of showing "the general direction of various portions of the coasts of the Maltese Islands". Malta's case does not involve reliance upon any assertion of a "general direction" of its coasts. That concept reflects a projection by Libya of thinking material to its own case, but not to Malta's. Moreover even if Malta had not drawn any baselines the operation of any system of base points on Malta's coasts would have led to a median line not significantly different from the one actually used by Malta.

13. For some reason, not specified, Libya appears anxious to reject the statement made in paragraph 72 of the Maltese Memorial, that Mr Ben Amer suggested on behalf of Libya in the meeting of 10 April 1974 "that each side should abandon its position in favour of a compromise proposal". To this end, the Libyan Counter-Memorial states that[2]

> "to avoid any risk of misunderstanding, it should be noted in this connection that the remark, attributed in paragraph 72 to Mr Ben Amer, about a compromise (said to have been made on 10 April 1974) related not to the substance but to the means of resolving the matter".

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[1] Libyan Counter-Memorial, p. 13, para. 1.11.

[2] *Ibid.*, p. 14, para. 1.13 (last sentence).

This is contrary to the facts as known to Malta. From Malta's notes of the meeting between the Prime Minister of Malta and Minister Ben Amer it emerges clearly that at one stage, when both parties still stuck to their original stand, Mr Ben Amer proposed that "both sides would forget their stands and would reach a compromise agreement". Prime Minister Mintoff immediately reacted by saying that that proposal (i.e. a compromise agreement)

> "had already been made before through Mr Ben Amer and that he had already informed Mr Ben Amer himself and later also the President that this was not acceptable".[1]

### 3. PETROLEUM ACTIVITIES OF THE PARTIES

14. In paragraph 1.14 the Libyan Counter-Memorial appears to attach "particular significance" to "the omission in the Maltese Memorial of reference to Malta's 1970 offer for bidding for two 'blocks' to the north and east of Malta mentioned in paragraph 4.29 of the Libyan Memorial . . .". What the relevance of this "omission" to the present case may be is far from clear, since the issue before the Court relates to the boundary south of Malta. But the Libyan Counter-Memorial then goes on to say that

> "it was not until the end of May 1974 that Malta in fact purported to extend its reach southward in the direction of 'Malta's Equidistance Line' by the grant of the concession to Texaco Malta Inc.".

That is not entirely true. The process of granting concessions to the south of Malta had begun three years earlier with the licence to Aquitaine in Block P3 of the Area No. 1. This can be seen clearly from Map No. 3 in Volume III of Malta's Memorial illustrating the grant of concessions by both Parties.

15. Paragraph 1.16 of the Libyan Counter-Memorial appears to make an issue out of the sequence of events in the grant of concessions. The facts are hardly disputed and are set out in convenient form on Map No. 3 of Volume III (Maps) of Malta's Memorial.

16. Malta takes this opportunity, however, to observe that the dates set out in footnote 1 to paragraph 1.17 of the Libyan Counter-Memorial do not seem to tie in with, at any rate, one of the documents filed with the Libyan Memorial. These dates purport to represent a "chronology of events in 1974" and begin with a reference to the conclusion on 14 April of "Principles of Agreement" between Libya and Total. Libya invokes this episode as revealing that "Libya entered into agreements before the Texaco concessions granted by Malta". But the letter from Total to the Chairman of Malta's Oil Committee, dated 31 July 1975, does not support this position.[2] In that letter Total describes

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[1] See Annex 1 of this Reply.

[2] See Libyan Memorial, Documentary Annex No. 57.

to the Chairman the basis on which Total was operating in the area. The letter does not refer to any "Principles of Agreement" of 14 April 1974. Instead it refers to a contract

> "concluded on 15 October 1974 with the Libyan NOC duly authorized to this effect by a Libyan law of 23 September 1974, and that this contract was ratified by a law promulgated by the Revolutionary Council of the Libyan Arab Republic on 13 November 1974".

Malta therefore also takes this opportunity to again invite Libya to produce to the Court, in time for examination before the commencement of the Oral Hearings, the texts of the "Principles of Agreement", the concession and the Exploration and Production Sharing Agreements mentioned in footnote 1 to page 16 of the Libyan Counter-Memorial.

17. The Libyan Counter-Memorial refers in paragraph 1.22 to evidence which is said to rebut the statement made in the Maltese Memorial, paragraph 79, that "no activities were carried out by [Libya's concessionaires] north of the equidistance line". The Libyan Counter-Memorial says[1]:

> "The reply, if any, from Exxon is not annexed to the Maltese Memorial and accordingly the suggestion in paragraph 79 that the absence of activities north of the equidistance line 'is confirmed by the replies received from the Libyan concessionaires' is not supported by any evidence produced by Malta and is contradicted by implication by the reply from Total of 31 July 1975".

Exxon's reply is annexed to this Reply[2] and does not bear out the Libyan contention. The material part says:

> "However, Esso advises that no seismic operations had been conducted within the area claimed by Malta, nor has Esso Libya conducted any drilling operations within such area".

Indeed a letter[3] addressed by Esso Standard Libya Inc. to the National Oil Corporation of Libya on 29 September 1974, and which in effect is an agreement supplementary to the Exploration and Production Sharing Agreement of 29 September 1974, above referred to, it is expressly agreed between Esso Standard and the National Oil Corporation that "until such time as there has been a demarcation of the offshore area subject to the jurisdiction of the Libyan Arab Republic from the offshore area subject to the jurisdiction of Malta ... Second Party [Esso Standard] will not be obliged to commence Petroleum Operations ... in waters north of latitude 34° 10′00″ North". That latitude is to the south of the point, on the equidistance line between Malta and Libya, which is nearest to Libya.

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[1] At p. 18, end of para. 1.22.

[2] Annex 2.

[3] Reproduced as Annex 46 of the Libyan Memorial.

## 4. The "No-Drilling Understanding"

18. It is not so much the facts relating to the "no-drilling understanding" which merit clarification at this juncture as the manner in which Libya now seeks to present those facts. Paragraphs 1.23–1.27 of the Libyan Counter-Memorial contain no less than three significant distortions of fact:

(i) Libya quotes in paragraph 1.23 one sentence from paragraph 6 of the Secretary-General's Report, namely:

> "Malta has confirmed that it had accepted the implicit understanding, when the Agreement was signed in 1976, that it would not begin drilling operations until the Court had reached a decision and an agreement on delimitation had been concluded in accordance with article III of the Agreement."

Libya did *not* quote the next sentence which would have presented a more balanced picture of the situation.

> *"Malta considered that since the Libyan Arab Jamahiriya had failed to ratify the Agreement [the Special Agreement in this case], it was legally entitled to commence drilling operations".*[1]

The fact that Libya states that "it does not accept unilateral responsibility for the non-ratification of the 1976 Agreement" does not, as a matter of objective analysis, relieve it of that responsibility.

(ii) At the end of paragraph 1.26, when referring to the account in Malta's Memorial of the meeting between the Prime Minister of Malta and the Prime Minister of Libya on 23 April 1980, the Libyan Counter-Memorial fails to mention the last sentence of that account which put developments in an entirely different light:

> "At the end of the meeting the Prime Minister of Libya said that the 1976 Agreement would be ratified and that the two sides would go to the Court in June (1980)".[2]

(iii) Yet, again, in paragraph 1.27 Libya bluntly asserts that "the no-drilling understanding had been breached by Malta", without appearing to appreciate that the basic conditions underlying the understanding had not been satisfied by Libya. In other words, Libya had persistently failed to act promptly, or indeed at all, in taking the steps necessary to secure the approval of the submission of the present case to the Court. In the face of such extended delay in placing the case before this Court, and in the absence of any indication of movement by Libya, Malta could not be expected indefinitely to forego exploration in the area of continental shelf to which in its view it was entitled.

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[1] For the full text, see Libyan Memorial, Annex 72. Emphasis supplied.

[2] Maltese Memorial, p. 29, para. 100. For an account of the meeting of 23 April 1980, see Annex 3 of this Reply.

# CHAPTER II

# ECONOMIC CONSIDERATIONS

19. Chapter 3 of the Libyan Counter-Memorial is devoted to a consideration of certain economic and other considerations introduced by Malta.

## 1. General Economic Considerations

20. Malta maintains its position that any delimitation in accordance with equitable principles in order to lead to an equitable result must take account of economic factors.

21. Malta also maintains its submission that the reference in paragraph 107 of the Court's 1982 Judgment in the *Libya/Tunisia Continental Shelf* case does not exclude recourse to economic considerations. The Court was not absolute in stating that the economic considerations mentioned in the case could not be taken into account. The Court said "they are *virtually* extraneous factors". This must necessarily mean that they are not entirely, or *a priori*, extraneous factors: only that in that particular case, the particular considerations were thought to be extraneous. Moreover, the Court acknowledged the possibility that

> "the presence of oil-wells in an area to be delimited ... may, depending on the facts, be an element to be taken into account in the process of weighing all relevant factors to achieve an equitable result"[1]

In any event, these passages must be read within the framework of the Court's more general and compelling observation in paragraph 71 of that Judgment:

> "Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it".

It would be a strange view of justice which, in relation to the determination of the boundaries of wealth (for that is what the determination of any boundary affecting resources involves), were to say that economic considerations have no bearing on the matter.

22. Paragraph 3.03 of the Libyan Counter-Memorial takes issue with Malta regarding Malta's argument in paragraphs 224 and 225 of its Memorial on its lack of land-based energy resources. In suggesting that

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[1] *I.C.J. Reports*, 1982, pp. 77–78, para. 107.

it is by no means certain that Malta will be permanently deprived of petroleum resources, that Libya's resource of oil is a diminishing asset and that Malta has other "natural" resources in the shape of a large tourist trade and rewarding ship repair work, Libya seeks to direct attention away from the one really important fact in this case: Libya has now, and for the last two decades has had, access to huge quantities of crude oil capable of generating for the people of Libya sufficient capital to satisfy all reasonable needs in terms of investment for the future. In comparison with all this, Malta has no truly natural resources. Though its weather may remain constant, the extent of its tourist trade depends entirely on world economic conditions. In this respect Malta does not enjoy the protection which Libya's large liquid capital resources afford that country. And the same is no less true of ship repair work – an industry which is directly and immediately affected by fluctuations in the world economy reflected in greater or less use of shipping. The fact that Libya may not be able to look forward indefinitely to an undiminished flow of oil from its on-shore works, in addition to its off-shore entitlement in areas unaffected by the present case, does not constitute a circumstance which supports Libya in its view that the area available to Malta for prospective development should be hugely reduced.

23. Apart from the disagreement between the Parties as to the relevance of economic considerations, there appears to be some difference between them as to the appropriate factors to weigh in assessing their respective equities in the situation.

24. Libya does not deny that it has more oil than Malta. Indeed this is indisputable. Nonetheless, it is appropriate to recall what this implies. In April 1982 as authoritative a source as the Economic Report on Libya published by the National Westminster Bank stated not only that Libya is the third largest oil exporter in OPEC but also that it has "proven reserves sufficient to last at least 40 years at prevailing rates of extraction". Moreover, even more recently, on 26 March 1984, *Petroleum Intelligence Weekly* wrote:

> "Development of Libya's first offshore oil field – largest to date in the Mediterranean – could add nearly 10% to the country's production capacity in one sweep."

There is, therefore, every prospect of Libya being able to maintain a massive income from the sale of oil for virtually half a century at least, with quite reasonable prospects of being able to go on even beyond that date.

25. Unable, therefore, convincingly to deny its evidently and disproportionately greater wealth, Libya seeks to eliminate the disparity between itself and Malta by the observation that "neither State can be classified as poor".[1] That suggestion quite distorts the discussion. The issue is not "are both rich or poor?" but "what is the comparative

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[1] Libyan Counter-Memorial, p. 59, para. 3.06.

wealth of one as against the other?". Of course, if Malta were truly a country of means, the comparison with Libya, even if it showed that Libya is much richer than Malta, would perhaps be less significant than in truth it is. But the real point is that Malta is not a country of means, and the assertion that "by any standards Malta is among the more prosperous developing nations of the world" is quite beside the point. Quite simply, the people of Malta work hard for their income. With no natural resources to support them, they have no alternative but to use their skills, in combination with their weather and geographical location, to make a living. But, even so the discrepancy between the capital resources of the two countries is irreconcilable.

26. Libya admits the disparity of wealth in terms of Gross Domestic Product (GDP) per head of population, though tucking away in a footnote the fact that Libya had in 1981 an income per head of some US$8450, as against US$3380 for Malta.[1] Libya's per capita income is thus some two and a half times as great as that of Malta. This admission is immediately qualified, however, by Libya's observation that this is a "crude measure" and is operative only at "the most superficial level". This qualification is in part true, though it does not operate in favour of Libya.

27. Malta agrees that considerations of per capita income do not necessarily reflect a country's particular economic conditions or situation. Indeed, Malta's *Development Plan 1981-85 – Guidelines for Progress* states, at p. 93:

> "By itself, however, growth in domestic product is not really a fair and reliable yardstick of economic expansion or of social progress. Taken in isolation, it does not adequately reflect the structure of domestic output or any changing trends in its composition and distribution or the social environment and institutional framework in which growth of national product has been registered."

28. In Malta's case per capita considerations do not show the weaknesses inherent in the island's economic structure and other factors and limitations which directly influence the local economy. In particular, such considerations fail to reveal the extreme openness and fragility of the Maltese economy resulting especially from the small size of the country, the small population and the lack of natural resources and raw materials. This means that Malta's efforts to develop its economy and improve national living standards have to rely almost exclusively on international trade.

29. This reliance on international trade for economic growth is shown by the fact that a large proportion of local manufacturing output has to be geared for export in view of the limited domestic base and that all semi-processed supplies required for further processing by Maltese manufacturing industries also have to be secured from abroad.

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[1] *Ibid.*, page 59, footnote 2.

Moreover, capital goods as well as fuel requirements also have to be procured completely from overseas sources. Furthermore, a strong thrust is given to the Maltese economy by tourists and ship repair work: both types of activity are of an international nature and thus further contribute to the openness of the local economy.[1]

30. There can be no doubt that Malta is at a great economic disadvantage vis-à-vis Libya on GDP per capita criteria even though this yardstick leaves unmeasured a number of crucial items which severely limit Malta's options and prospects for economic growth. In the circumstances, putting Malta "among the most prosperous developing nations of the world" – as the Libyan Counter-Memorial does – is a facile conclusion which completely ignores the limitations referred to above.

31. The Libyan Counter-Memorial also refers to the economic structure of the two countries and draws the conclusion that Malta's economic structure is more "mature" than Libya's and that Malta has a "diversified" range of goods and services. In this context it should be pointed out that:

(a) The local manufacturing industry relies fairly heavily on textiles and clothing which are traditionally low-skill activities and subject to volatile international market demand conditions. Total production in firms employing more than 10 workers during 1982 stood at Lm239.9 million: textiles and clothing accounted for Lm73.2 million (30.5 per cent).

(b) Total employment in these establishments at the end of 1982 stood at 23,556 of which 8,887 (37.7 per cent) were engaged in the production of textiles and clothing.

(c) The local tourist industry is heavily dominated by UK tourist traffic. Out of 510,956 visitors during 1982, no less than 331,712 (65 per cent) were UK arrivals.

(d) Domestic exports are heavily biased towards clothing items. Total domestic exports during 1982 reached Lm150.1 million: of this amount exports of clothing stood at Lm68.1 million (45.4 per cent).

32. On the other hand, the underlying strength and prospects of the

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[1] The following table compiled from Government Statistics indicates clearly the openness of the Maltese economy and hence its vulnerability to international economic events – a point which GDP per capita measurements fail to highlight. In brackets are the corresponding figures for Libya (for 1981, the latest available) taken from Lloyd's Bank Economic Report 1983.

| | *1982* | |
|---|---|---|
| (i) GDP at factor cost | Lm417.8 million | (US$30,329 million) |
| (ii) Exports of goods and services | 319.8 million | 16,562 million |
| (iii) Imports of goods and services | 394.6 million | 17,458 million |
| (iv) (ii) as a % of (i) | 76.5% | 54.6% |
| (v) (iii) as a % of (i) | 94.4% | 57.6% |

Libyan economy compared to the "chronic" weaknesses of the Maltese economy are demonstrated by the following observations:

(a) Largely by virtue of its oil resources and proven oil reserves, Libya has enjoyed and is expected to continue to enjoy in the coming years a favourable surplus in its external trade transactions. Malta has persistently suffered from a deficit in its visible trade transactions and will continue to do so given the limitations referred to above.

(b) Again, given the peculiar characteristics of the economy of the two countries, development policy in both Malta and Libya attaches considerable importance to the development of the productive sectors. Whereas Libya can continue to allocate enormous outlays out of its substantial oil revenues towards the development of productive activities, funds at Malta's disposal to stimulate the development of the productive sectors are severely limited. In this regard Libya finds itself in an advantageous situation in the sense that its extensive natural resources can provide raw materials around which its productive sectors can be structured. Obviously Malta cannot do this; and although economic activity in the island is spread among various sectors, these activities (with the exception of agriculture) derive, and will of course continue to derive, their main thrust from international trade rather than from domestic-oriented and locally-generated sources.

33. The Libyan Counter-Memorial, in suggesting that Malta "ignores the question of population", seeks to contrast Libya's high rate of natural population increase ("one of the highest rates of natural population increase in the world") with what it claims is Malta's declining growth.[1] But, to use Libya's own expression, Libya "has the facts wrong". Malta's population trend has always shown an upward trend. The natural increase in population was prevented from becoming an actual increase, at an alarming rate, of the number of Maltese living in Malta, by an exodus through migration, unprecedented in Maltese history and probably unrivalled by any other country. Between 1950 and 1970 alone, there was a net flow of more than 100,000 emigrants from Malta to Australia, the United Kingdom, Canada, the United States of America and other countries. In more recent years the population of Malta has again been registering a systematic increase. Not only have States ceased to encourage immigration, as was the case before the 1974 oil crisis; they are now suffering from a recession which is causing many Maltese migrants to return to their native land. As can be seen from the Table in the footnote overleaf there has been an increase from 303,263 in 1975 to 326,178 in 1982. Contrary to Libya's statement, there have been in each year after 1974 (with the exception

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[1] Libyan Counter-Memorial, p. 60, para. 3.10.

of 1981) more immigrants returning than there have been emigrants departing.[1]

## 2. Fishing

34. In approaching the question of the relevance and role of fisheries in Malta's case, it is important to keep the point in proportion. It is merely one aspect, and not the dominant one, of the statement of economic circumstances relevant to the determination of the continental shelf boundary. However, the Libyan Counter-Memorial accords to it virtually twice the discussion that it gives to the wider economic considerations. The opening sentence of paragraph 3.12 of the Libyan Counter-Memorial should therefore be read with some caution. There is no justification for the statement there made that "it is evident that the Maltese Memorial accords fishing activity a major role in the present case". Malta is as aware as Libya of the interrelationship of fisheries, the continental shelf and the exclusive economic zone. It does not seek to exaggerate the role of fisheries.

35. But that does not mean that Malta's reference to fishing activity is "legally invalid", as is suggested in the Libyan Counter-Memorial, paragraph 3.14. *Kannizzati* fishing, which involves the anchoring of a cluster of palm leaves, is an activity of which an essential element is the continuous contact of the stone anchor with the seabed during the whole fishing season and is thus directly related to the use of the continental shelf resources.

36. The Libyan Counter-Memorial raises, in paragraph 3.65, a false issue when it seeks to correct "an impression ... that fishing is important to the Maltese economy". That is not what Malta argued. Fishing does not have to be an important part of the economy to be a circumstance relevant to continental shelf delimitation. It merely has to be an activity related to continental shelf resources in which a signi-

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[1] (Taken from published Maltese Government Statistics)

The following table shows that the Maltese population is on the increase and that net migration flows have contributed to this increase.

| Year | Maltese population at the beginning of the year | Natural Increase | Migration Balance* | Total Change | Population at end of year |
|---|---|---|---|---|---|
| 1975 | 298,903 | 2824 | + 1536 | + 4360 | 303,263 |
| 1976 | 303,263 | 2729 | + 1571 | + 4300 | 307,563 |
| 1977 | 307,563 | 2921 | + 1096 | + 4017 | 311,580 |
| 1978 | 311,580 | 2378 | + 77 | + 2555 | 314,135 |
| 1979 | 314,135 | 2855 | + 1061 | + 3916 | 318,051 |
| 1980 | 318,051 | 2387 | + 500 | + 2887 | 320,938 |
| 1981 | 320,938 | 2230 | − 175 | + 2055 | 322,993 |
| 1982 | 322,993 | 2862 | + 323 | + 3185 | 326,178 |

*Difference between the number of migrant outflows and inflows.

ficant number of people are involved and which forms an identifiable feature of Maltese life. Nothing said in the Libyan Counter-Memorial runs counter to this.

On the point made specifically regarding *kannizzati* fishing, the Libyan Counter-Memorial provides no evidence to support its blunt contradiction of the statement in Malta's Memorial.[1]

### 3. MALTA'S STATUS AS AN "ISLAND DEVELOPING COUNTRY"

37. The Libyan Counter-Memorial[2] seeks to meet, as it puts it, "head on" Malta's reference to its status as an island developing country by noting that the 1982 Law of the Sea Convention makes no reference to this category of States. There is no reason why it should have. It is true that the Preamble to the Convention refers to the interests and needs of "developing countries, whether coastal or land-locked" and does not refer to "island developing States". But why should it do so? The expression "coastal or land-locked" is a comprehensive one and clearly includes "islands". There was, therefore, no need for a specific reference of this kind.

38. The inadequacy of this textual approach of the Libyan Counter-Memorial is even more marked when one comes to Article 83 of the Convention which deals specifically with continental shelf delimitation. The clear implication of the Libyan argument is that one might have expected to find some reference to "island developing countries" in that Article. But given the history of the emergence of that Article, the wide range of conflicting positions which stood in the way of the adoption of a detailed text and the eventual last-minute appearance of the present generalized provision, it is hardly surprising that it contains no reference to the position of island developing States or indeed any other particular kind of State.

39. The point which the Libyan Counter-Memorial studiously disregards and, indeed, seeks to obscure is that the United Nations has identified "island developing countries" as a group of States whose special position should be acknowledged and for whose particular needs some special provision should be made. Libya's response to this reference is to attempt to differentiate Malta from other island developing States by saying that the reasons why the United Nations or its agencies concerned themselves with island developing States did not apply to Malta.[3] The attempt is, however, defeated by the words of the resolution which Libya itself quotes. Thus, while Libya sees in the Preamble to UNCTAD Resolution 65(III) of 1972 references to "difficulties in respect of transport and communications" which – so Libya asserts – are problems that do not face Malta, Malta notes in that same Preamble that these difficulties are identified as being, "amongst others" and are "limited to their geographical nature".

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[1] See Libyan Counter-Memorial, p. 64, para. 3.20.

[2] p. 66, para. 3.27.

[3] See Libyan Counter-Memorial, p. 67, para. 3.29.

40. Nor is it correct, as is done in paragraph 3.33 of the Libyan Counter-Memorial, to liken Malta to Hong Kong and Singapore. By no stretch of the imagination can the economy of those two entities be compared with that of Malta. Each is one of the world's leading financial and commercial centres generating huge amounts of income by virtue of the provision of international air transport and of *entrepot* traffic.

41. Lastly, it is to be noted that the Libyan Counter-Memorial[1] misstates and, therefore appears to misunderstand the nature of Malta's reference to its position as an island developing country. Libya suggests that Malta is "precluded on any rational grounds from claiming the protection of any notional concessions due from the international community to the really poor developing countries of the world". But the real point is that Malta is not asking for concessions from the international community. It is asking the Court to bear in mind that Malta is an island developing country and Libya is not; that Malta's economic needs are vastly greater than Libya's; that this has been recognized by the United Nations including Malta within the classification of island developing countries. For the Court to disregard this consideration would not be consistent with the controlling requirement of the law in this situation, namely, that equitable principles must be applied to reach an equitable result. Malta is not asking in this case for something from the international community. It is asking only that an internationally and objectively determined difference between itself and Libya should be borne in mind in determining where it is equitable that the resource boundary between the two States should run.

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[1] P. 69, para 3.34.

# PART II

# THE PRINCIPLES AND RULES OF INTERNATIONAL LAW GOVERNING DELIMITATION

## INTRODUCTION

42. Malta has set out its views on the principles and rules of international law applicable to the present case in Part III, Chapters I and II, of its Counter-Memorial.[1] Malta does not propose to restate its position on these questions and will limit itself to a number of clarifications which appear to be necessary in the light of the Libyan Counter-Memorial.

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[1] Maltese Counter-Memorial, pp. 45-83, paras. 75-176.

# CHAPTER III

## THE NATURE OF THE DELIMITATION SOUGHT AND THE SOURCES OF THE APPLICABLE LAW

### 1. The Law Applicable to the Delimitation of the Continental Shelf

43. The delimitation in respect of which the Parties have sought the assistance of the Court by the Special Agreement is that of their common continental shelf. Malta has shown that the law applicable to this delimitation is customary international law as it has developed in the practice of States, in the work of the Third United Nations Conference on the Law of the Sea and in the cases. Of special importance in this connection are the terms of Article 76(1) of the 1982 Law of the Sea Convention and the emergence in international law of the concept of the exclusive economic zone.[1]

44. Libya does not deny that the provisions of Article 76 of the 1982 Convention declare rules of customary international law. It seeks, however, to reduce their effect in two ways. First, it maintains that these provisions relate exclusively to the outer limit of the continental shelf and are, therefore, irrelevant to its delimitation. In the second place, Libya maintains that, even on the plane of entitlement and of the outer limits of the shelf, the principle of distance expressed in this article possesses no more than a "subsidiary character", while natural prolongation, in the physical sense of the term, "remains the primary basis for the entitlement to continental shelf rights".[2] Malta will revert later to these two aspects of the Libyan argument. For the moment, however, it is sufficient to observe that this thesis amounts to a pure and simple denial of the important development of the concept of the continental shelf, as reflected in particular in the work of the Third Conference on the Law of the Sea and in the cases.

### 2. The Relevance of the Exclusive Economic Zone to the Delimitation of the Continental Shelf

45. In the same perspective, Libya, though not denying the emergence in international law of the concept of the exclusive economic zone and of the principle of distance which is its inseparable corollary,

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[1] *Ibid.*, paras. 76–82.

[2] Libyan Counter-Memorial, pp. 98–101, paras. 4.46–4.52.

tries again to minimize its significance in the present case. On several occasions the Libyan Counter-Memorial recalls the fact that the Court is called upon to delimit the rights of the Parties in the seabed and its subsoil to the exclusion of the superjacent water column:

> "... fishing bears no relation to the continental shelf ... the Maltese fishing activities ... might only have relevance to any Exclusive Economic Zone of Malta. (To date, Malta has claimed no Exclusive Economic Zone but has legislated for a 25-mile fishing zone around the Maltese Islands ...)[1]
>
> "The delimitation of the continental shelf in the present case does not prejudge delimitation of the Exclusive Economic Zone (or fishing zone)".[2]
>
> "... it is not the column of water – which is the primary concern of the Exclusive Economic Zone – that is before the Court in this case ..."[3]

From these remarks, Libya seeks to conclude that the criterion of distance, the place of which in the concept of the exclusive economic zone it does not deny,[4] has no role to play in the present case, which is concerned solely with the continental shelf.

46. Malta agrees with Libya in regarding the present case as relating exclusively to the delimitation of areas of the continental shelf appertaining to the two countries. Malta considers, however, that the evolution of the concept of the continental shelf and its absorption in the multi-purpose jurisdiction of the exclusive economic zone (as defined in Article 56 of the 1982 Convention), cannot be regarded as without relevance or influence upon the rules governing the delimitation of the continental shelf. In other words, Malta considers that the delimitation of the continental shelf between Malta and Libya cannot be carried out without bearing in mind the evolution of the concept of the continental shelf and its relationship with that of the exclusive economic zone. In this connection one may recall that the Court has referred to "... the historic evolution of the concept of continental shelf, from its inception in the Truman Proclamation ..., through the Geneva Convention of 1958, through the *North Sea Continental Shelf* cases and subsequent jurisprudence, up to the draft convention of the Third Law of the Sea Conference, and its evolution in State practice".[5] The Court has also stated that it has "endorsed and developed those general principles and rules which have thus been established",[6] and has emphasized that the concept of natural prolongation, introduced by the Court itself in 1969 as part of the vocabularly of the international law of the sea, "was and

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[1] Libyan Counter-Memorial, p. 62, para. 3.14.

[2] *Ibid.*, p. 62, footnote 1.

[3] *Ibid.*, p. 71, para. 3.39.

[4] *Ibid.*, p. 100–101, para. 4.52.

[5] *Tunisia-Libya Continental Shelf* Case, *I.C.J. Reports*, 1982, p. 92, para. 132.

[6] *Ibid.*

remains a concept to be examined within the context of customary law and State practice".[1] Accordingly, it seems inconceivable to Malta that the delimitation of the continental shelf between Malta and Libya could be carried out, as Libya apparently would like, in complete disregard of the evolution of the continental shelf and of its relationship with the exclusive economic zone.

47. Malta believes that one cannot overlook the fact that the concept of the exclusive economic zone confers upon the coastal State up to a distance of 200 miles from its coasts sovereign rights relating to natural resources, both in the seabed and subsoil and in the superjacent waters (as appears clearly from the terms of Article 56 of the 1982 Convention). One may not, therefore disregard the fact that either or both of the Parties may at any time declare an exclusive economic zone. Nor can one ignore the significant practice of States of adopting, more and more often, "maritime" as opposed to merely "continental shelf" boundaries. Libya recognizes the existence of this practice,[2] and Malta notes with satisfaction that Libya thus shows to be aware of the evolution of customary international law and of the practice of States in this matter. It regrets, however, that Libya nonetheless persists in proposing to the Court a delimitation which takes no account of this development.

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[1] *Ibid.* p. 46, para. 43.

[2] Libyan Counter-Memorial, p. 108, para. 5.21.

# CHAPTER IV

# ENTITLEMENT AND DELIMITATION

## 1. THE RELATIONSHIP BETWEEN ENTITLEMENT AND DELIMITATION

48. Libya forcefully restates in its Counter-Memorial "the elementary distinction between continental shelf entitlement, on the one hand, and continental shelf delimitation between conflicting claims to the same continental shelf, on the other hand"[1] – a distinction to which it had already claimed to attach great importance in its Memorial.[2] Malta has already said in its Counter-Memorial that it "sees no objection to the legal distinction" between these two concepts.[3] However the fact that the two concepts are distinct in no way means that they have no juridical relationship, nor does it mean that entitlement can have no impact upon delimitation. It is on this very point – of great importance in the search for the law applicable to the delimitation – that the views of the Parties diverge.

49. Libya's position on the question of the relationship between entitlement and delimitation is confused and contradictory.

50. The legal basis of title, as defined in Article 76, i.e. the distance principle, is relevant, so we are told, in relation to "outer limits" but has no bearing in the quite different sphere of delimitation:

> "The 200-mile distance from the coast determines only the outward limit up to which a coastal State may claim jurisdiction over the maritime areas before its coasts but does not provide criteria for the delimitation of these jurisdictional zones vis-à-vis other States"[4].

According to Libya, there is an impenetrable barrier between, on the one hand, the entitlement to continental shelf, even though such entitlement is based not on "physical facts" but on distance from coasts, and, on the other, delimitation between neighbouring States. This leads Libya to the following sweeping affirmation :

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[1] Libyan Counter-Memorial, pp. 80–81, para. 4.10; cf., p. 81, para. 4.12; p. 97, para. 4.43; p. 98, para. 4.46; p. 101, para. 4.52.

[2] Libyan Memorial, p. 81, paras. 6.01–6.02.

[3] Maltese Counter-Memorial, pp. 54–56, paras. 96–100.

[4] Libyan Counter-Memorial, p. 101, para. 4.52; cf. p. 80, para. 4.10; p. 81, para. 4.12. Also in the same sense see Libyan Memorial p. 82, paras. 6.04 and 6.06; pp. 89–90, para. 6.22.

> "... there is no so-called 'distance principle' in international law that would apply to the delimitation in the present case ..."[1]

51. This also leads Libya, each time that Malta refers to the distance criterion and to Article 76 for the purpose of drawing therefrom consequences relevant to the delimitation of the continental shelf, to accuse Malta of confusing matters which should be kept separate.[2] But one is tempted to ask, if Libya were truly convinced that the notion of the continental shelf, as set out in Article 76, has no bearing whatsoever on delimitation but only on the seaward extent to which a State is entitled to continental shelf rights, why does Libya take so much trouble to attempt to establish that the distance criterion has – even for entitlement – a subsidiary character and that natural prolongation in the physical sense of the term remains – even for entitlement – the primary and fundamental base?[3] Malta will revert to this point when it examines more fully the true legal basis for entitlement.

52. On the other hand, when it is a matter of natural prolongation in the physical sense of the term and of what Libya calls the "physical factors",[4] a close link is asserted in the Libyan pleadings between entitlement and delimitation: distance is removed to an orbit away from entitlement and the outer limit, while natural prolongation – in the physical sense of the term – is accorded a place both in entitlement and in delimitation:

> "... each Party must as a first step establish the basis of its claim for legal entitlement before turning to the operation of delimitation. The physical factors that constitute the respective natural prolongations of the Parties – and hence their legal entitlement – logically come first in the discussion of relevant circumstances".[5]
>
> "These physical facts ... relate both to the legal entitlement of the Parties to areas of the continental shelf lying between the Parties and to the delimitation of such areas between them."[6]

53. The link between entitlement and delimitation is especially strong, so Libya maintains, when "there are basic discontinuities in the seabed and subsoil which arrest the natural prolongation – and hence the legal entitlement – of a particular State or States"[7] and when one is thus confronted by two States situate on different continental shelves. In such a situation, so it is said, the physical facts "bear directly

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[1] Libyan Counter-Memorial, p. 102, fn. 3.

[2] *Ibid.*, p. 98, para. 4.46.

[3] *Ibid.*, pp. 98–99, paras. 4.47–4.48; cf. Libyan Memorial, p. 89, paras. 6.20–6.21.

[4] Libyan Counter-Memorial, p. 23, para. 2.04.

[5] *Ibid.*, p. 23, para. 2.05.

[6] *Ibid.*, p. 56, para. 2.84.

[7] *Ibid.*, p. 23, para. 2.05.

on the question of which areas do, in fact, lie between the Parties"[1] and "legal entitlement and delimitation go hand in hand".[2] "Such is the case" it is said "in the present delimitation between Libya and Malta",[3] and it is thus the so-called Rift Zone and the line of the escarpments which, according to Libya, mark at the same time the seaward entitlement of each of the two States and the delimitation between them:

> "the same evidence which determines title will demonstrate not only the area of entitlement, but also the limits of the natural prolongation with sufficient precision to provide a basis for delimitation . . ."[4]

54. It is difficult to understand why entitlement and delimitation should be totally separated when entitlement rests on a given distance from coasts and may "go hand in hand" when entitlement is dependent upon natural physical prolongation. This mystery still remains unresolved.

### 2. ENTITLEMENT AND DELIMITATION GO HAND IN HAND

55. The truth is that entitlement and delimitation – even though distinct concepts – always go hand in hand. For this there are two reasons.

#### (a) *Natural Prolongation and the Distance Criterion*

56. The first is that it is totally inconceivable that the delimitation of the continental shelf between two States should be achieved in the same manner whatever may be the legal basis of title to the continental shelf. Delimitation in accordance with the principles and rules of international law cannot be the same, regardless of whether the legal basis of the title of the coastal State lies in the physical facts, or rests on the principle of distance from the coasts. When the Court stated in 1969 that "delimitation is to be effected . . . in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea",[5] this was because the Court had previously affirmed that the legal basis of a State's continental shelf rights rested on the "natural prolongation of its land territory into and under the sea".[6] Again, when the Court in 1982 stated that, within the framework of the new conception of the continental shelf, as expressed in Article 76, "it is only the legal basis of the title to continental shelf rights – the mere distance from the coast – which can be taken into account as possibly having

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[1] *Ibid.*, p. 56, para. 2.84.

[2] Libyan Memorial, p. 83, para. 6.09.

[3] Libyan Counter-Memorial, p. 23, para. 2.05.

[4] Libyan Memorial p. 91, para. 6.25.

[5] *I.C.J. Reports*, 1969, p. 53, para. 101.

[6] *Ibid.*, p. 22, para. 18 and p. 31, para. 43.

consequences for the claims of the Parties", it was only because the Court had just observed that distance from the coasts now suffices in certain circumstances to establish the title of the coastal State.[1] Thus, according to the Court, the evolution of entitlement to continental shelf rights had direct and immediate consequences for delimitation. The Court stated the existence of this link in the clearest possible way when it said that the law applicable to the delimitation of the continental shelf "must be derived from the concept of the continental shelf, as understood in international law".[2] If "the concept of the continental shelf, as understood in international law" has evolved from natural physical prolongation towards a given distance from the coasts, then there cannot be the least doubt that the law applicable to delimitation must find a place today for the criterion of distance from the coasts, just as it had previously found a place for the physical facts of natural prolongation.

### (b) *The Method of Delimitation Must Be Rooted in the Legal Basis of Title.*

57. There is a second reason why entitlement and delimitation always go hand in hand. In order to conform to the requirements of international law, the delimitation of the continental shelf must lead to an equitable result. On this point both Parties are in agreement. However, this is not the only requirement. Not every method capable of leading to an equitable delimitation is, simply by virtue of this conclusion, legally appropriate. It is also necessary that the method selected should be rooted in the legal basis of title to continental shelf rights – or in other words that it should be "derived from the concept of the continental shelf, as understood in international law". Thus the Anglo-French Court of Arbitration said that it did not possess "carte blanche to employ any method it chooses in order to effect an equitable delimitation of the continental shelf",[3] and declined to use a method which, even if it might have led to an equitable result, "did not appear to the Court to be one that is compatible with the legal régime of the continental shelf".[4]

## 3. THE PROCESS OF DELIMITATION

58. It is in the perspective of this relationship between entitlement and delimitation that one must view Malta's statement in its Counter-

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[1] *I.C.J. Reports*, 1982, p. 48, para. 48.
[2] *Ibid.*, p. 43, para. 36.
[3] *Anglo-French Continental Shelf Arbitration*, Decision of 30 June, 1977, para. 245.
[4] *Ibid.*, para. 246.

Memorial that the process of delimitation involves two steps: first, as a starting point, the taking into consideration of a line dictated by a method "derived from the concept of the continental shelf, as understood in international law" (to use an expression of the Court) and "compatible with the legal régime of the continental shelf" (to use the language of the Anglo-French Court of Arbitration); and second, testing the equity of the result and, if need be, adjusting the line in order to reach an equitable result.[1] Libya, it seems, takes a position similar to that of Malta as regards the function of relevant circumstances in the process of delimitation.[2] As has been noted, Libya accepts the link between entitlement and delimitation so long as the legal basis of title may be seen as resting in natural prolongation, but disputes the existence of any such link as soon as it involves the principle of distance.

59. Malta does not consider it necessary to restate its views on the delimitation process, and respectfully requests the Court to refer on this subject to the relevant passages in its Counter-Memorial.[3] The observations which follow will thus be limited to the two aspects of the delimitation process on which the Parties are the most sharply divided: the legal basis of title to continental shelf rights from which the delimitation method must "be derived" and the place of equidistance in the delimitation of the continental shelf.

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[1] Maltese Counter-Memorial, pp. 57-58, paras. 103-117; pp. 74-83, paras. 152-176.

[2] Libyan Counter-Memorial, p. 117, para. 5.48.

[3] Maltese Counter-Memorial, pp. 57-61, paras. 103-117.

# CHAPTER V

## LEGAL BASIS OF TITLE: THE CONCEPT OF NATURAL PROLONGATION

### 1. THE SO-CALLED "PHYSICAL FACTS" OF NATURAL PROLONGATION

60. The Libyan Counter-Memorial repeats the argument already developed in its Memorial: the legal basis of title to continental shelf rights, it explains again, rests in natural prolongation in the physical sense of the term; and, since in this case there are two physically distinct continental shelves, the delimitation must follow the line of the separation of these two shelves.[1]

61. Upon closer examination the Libyan argument now seems to have undergone some change. When Libya spoke in its Memorial of natural prolongation "in its traditional character as a physical concept" it appeared to be referring essentially to the geomorphological and geological aspects of the seabed and its subsoil; and it was in this connection that it emphasized the so-called Rift Zone and the Escarpments-Fault Zone, which it described as major geological and geomorphological features.[2] It is true that this geological and geomorphological view of natural prolongation reappears in the Counter-Memorial, where it is invoked, as it was in the Memorial, in support of the Libyan thesis of a delimitation "within the Rift Zone" and terminating east of the Escarpments-Fault Zone.[3] The Counter-Memorial, however, – and this is the new element – adds to the geological and geomorphological features of the natural prolongation the feature of geography and, more especially, that of the configuration of the coasts. Of course, geographical factors were not entirely absent from the Memorial, but they were presented rather as some amongst a number of other relevant circumstances.[4] In the Counter-Memorial, geography is in fact integrated into the very concept of natural prolongation, which is henceforth to be composed of the three elements of geography, geomorphology and geology, brought together under the generic description of "physical facts".[5] The geological and geomorphological components, on the one hand, and the geographical component, on the

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[1] Libyan Counter-Memorial, p. 23, para. 2.05; pp. 49-56, paras. 2.70-2.84.

[2] See e.g., Libyan Memorial, p. 92, para. 6.28, p. 127, para. 8.01; p. 132, paras. 8.13 and 8.14; p. 133, paras. 8.17 and 8.18.

[3] Libyan Counter-Memorial, pp. 42-56, paras. 2.52-2.84.

[4] See e.g., Libyan Memorial, p. 104, para. 6.61; p. 135, para. 9.03.

[5] Libyan Counter Memorial, pp. 23, para. 2.05 and fn. 2.

other, although combined in the idea of the "physical facts" of natural prolongation, perform different functions. The first two support the argument of the "Rift Zone" and of the Escarpments–Fault Zone; the third is used to counter equidistance and support the argument of proportionality.

62. Before examining these two aspects of the Libyan argument more closely, it is to be observed that the different components of the new concept of natural prolongation as advanced by Libya do not necessarily agree with, and indeed may contradict, one another. This was already true of geology and geomorphology. In the *Tunisia/Libya* case, for example, the two Parties both relied on natural prolongation in the scientific sense of the expression, but one referred to geomorphology and the other to geology, and the results which each reached were by no means the same. The same case also showed that, even as a geological concept, natural prolongation might refer to different aspects of geology. There is therefore all the more reason for asserting that there is no necessary or inherent correlation between geographical considerations on the one hand and geological or geomorphological considerations on the other. Suppose for the sake of argument that title depends on natural prolongation, as revealed by geology or geomorphology, and that the delimitation must reflect any major discontinuity in the geology or geomorphology of the seabed. One still cannot see why coastal geography should lead necessarily, and in every case, to an identical delimitation line. Indeed, in actual fact, the contrary is at least equally likely to be the case. One may here recall the observation already made in the Maltese Counter-Memorial that between proportionality and natural prolongation in the geological or geomorphological sense there exists no logical or necessary relationship.[1]

63. However it may be, neither in its traditional geological and geomorphological components nor in its new geographical version does the concept of natural prolongation, as developed by Libya on the basis of an enlarged theory of "physical facts", constitute – in contemporary international law – the entitlement to continental shelf rights. It is in the *legal* concept of natural prolongation, centred on distance from the coasts, that one can now find the legal basis of title to continental shelf rights – and at the same time the point of departure for the process of delimitation – and not in the strange collection of "physical facts" advanced by Libya.

### 2. Geology and Geomorphology:
### Their Irrelevance in the Present Case

64. Malta does not consider it useful at this juncture to comment in detail on the geological and geomorphological components of the Libyan theory of natural prolongation. This has already been criticized

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[1] Maltese Counter-Memorial, p. 19, para. 39; pp. 103–105, paras. 231–236.

in the Maltese Counter-Memorial on the scientific plane,[1] as well as on the legal plane,[2] and Malta respectfully requests the Court to refer to the appropriate passages. Malta will merely add a few brief comments.

### (a) *The Evolution of the Concept of Continental Shelf*

65. Libya continues to see the continental shelf as an essentially geological and geomorphological phenomenon. It disregards the trend away from the geological and geomorphological concept of natural prolongation which has characterized the evolution of the theory of the continental shelf. It develops its argument as if the legal concept of the continental shelf had not changed at all since the stage – which had already been left behind during the work of the International Law Commission – when the continental shelf was still the "species of platform" mentioned in the Court's judgment of 1969 "which has attracted the attention first of geographers and hydrographers and then of jurists".[3] Libya seems to disregard the evolution of the concept over a period of 30 years which has increasingly led to the detachment of the concept of the shelf itself – and, consequently, the delimitation of the shelf – from purely geological and geomorphological considerations. Even in the 1958 Convention, as the Court has observed, there was a "lack of identity between the legal concept of the continental shelf and the physical phenomenon known to geographers by that name".[4] Since then this aspect of the evolution has been emphasized, and "the legal concept, while it derived from the natural phenomenon, pursued its own development".[5] Thus, as the Court has also remarked, the continental shelf

> "... is an institution of international law which, while it remains linked to a physical fact, is not to be identified with the phenomenon designated by the same term ... in other disciplines".[6]

In terms of this "widening of the concept for legal purposes",[7] it is certainly not natural prolongation in the geological and geomorphological sense which constitutes the legal basis of title to continental shelf rights:

> "... at a very early stage in the development of the continental shelf as a concept of law, it acquired a more extensive connotation, so as eventually to embrace any seabed area possessing a particular relationship with the coastline of a neighbouring State, whether or

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[1] Maltese Counter-Memorial, pp. 20–32, paras. 41–62.
[2] *Ibid.*, pp. 62–74, paras. 118–151.
[3] *I.C.J. Reports*, 1969, p. 51, para. 95.
[4] *I.C.J. Reports*, 1982, p. 46, para. 42.
[5] *Ibid.*
[6] *Ibid.*, p. 45, para. 41.
[7] *Ibid.*

not such area presented the specific characteristics which a geographer would recognize as those of what he would classify as 'continental shelf'".[1]

(b) *Article 76 (1) of the 1982 Convention*

66. In a desperate effort to negate the effect of the evidence, Libya does not hesitate to give to Article 76(1) of the 1982 Convention – which reflects the outcome of this evolution – an interpretation which deprives it of all sense. The provision, so the Counter-Memorial contends, has no more than a subsidiary character, and the principle remains that of natural prolongation in its physical sense.[2]

67. The truth is quite otherwise. It was in response to the requirements of States with a narrow continental margin, and with a view to maintaining equality between all coastal States, that the Law of the Sea Conference enlarged to 200 miles the continental shelf rights of all coastal States, regardless of the geomorphological and geological configuration of the seabed lying off their coasts. Only those few States whose continental margin stretches further than 200 miles would have been adversely affected by this provision, since the 1958 criterion gave them rights to a depth of 200 metres, even though these might lie further out than 200 miles. That is why it was decided to provide that these States might continue to enjoy continental shelf rights even beyond 200 miles on the basis of physical natural prolongation. But it is not correct to say, as Libya does, that Article 76 contains a "primary basis for the entitlement to continental shelf rights" – physical natural prolongation – and a "subsidiary title to continental shelf rights" – a distance of 200 miles. Article 76 sets out two rules of equal force: up to 200 miles from the coasts, distance is the basis for the legal title of the State; beyond 200 miles, the coastal State has rights based on physical natural prolongation, these rights themselves being limited to a distance not exceeding 350 nautical miles.

68. Again, contrary to what Libya appears to think,[3] the Court has not in any way contemplated that the title of a State based on distance is a "subsidiary title": paragraphs 47 and 48 of the judgment in the *Tunisia/Libya* case say nothing of the kind. What the Court said is that paragraph 1 of Article 76 "consists of two parts, employing different criteria".[4] There is not the slightest trace of any hierarchy between the two. Again what the Court said is that "the distance of 200 nautical miles is in certain circumstances the basis of the title of a coastal State"[5] – "in certain circumstances", that is to say, in all cases save that of a broad-margin State. Again, what the Court said is that "in so far ... as

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[1] *I.C.J. Reports*, 1982, p. 45 para. 41.

[2] Libyan Counter-Memorial, p. 99, para. 4.48.

[3] *Ibid.*, p. 98, para. 4.47.

[4] *I.C.J. Reports*, 1982, p. 48, para. 47.

[5] *Ibid.*

the paragraph provides that in certain circumstances the distance from the baseline, measured on the surface of the sea, is the basis for the title of the coastal State, it departs from the principle that natural prolongation is the sole basis of the title".

### (c) *Case Law and Physical Features*

69. Since it is not in the geology or the geomorphology of the seabed or its subsoil that one can find the legal basis of title but in the combination of coasts and distance, the geological and geomorphological configurations cannot play any controlling role in the process of delimitation. Just as the entitlement of a coastal State towards the open sea is not affected by geological or geomorphological features, such a trench or a depression lying less than 200 miles from its coasts, so there is no legal reason for attributing to such features any role in delimitation between neighbouring States. That two States may agree between themselves to delimit their continental shelf by reference to the geological or geomorphological configuration of the seabed is no doubt true: no rule of *jus cogens* prohibits it. But examination of State practice shows – as will presently be explained – that States hardly ever do this. To reduce the function of the Court when charged with delimitation in accordance with the law to identifying the "basic discontinuities in the seabed and subsoil which arrest the natural prolongations of the Parties – and hence their legal entitlement",[1] is inconceivable in the present state of international law. It is necessary to recall that in 1977 the Anglo-French Arbitration Tribunal considered that

> "... there does not seem to be any legal ground for discarding the equidistance or any other method of delimiting the boundary in favour simply of such a feature as the Hurd Deep-Hurd Deep Fault Zone".[2]

One should also recall that in 1982 the Court refused to delimit the boundary by a simple identification of an alleged interruption or physical separation of the natural prolongations of the two Parties.[3] On the contrary, the Court said that in certain circumstances – that is to say beyond 200 miles –

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[1] Libyan Counter-Memorial, p. 23, para. 2.05.

[2] *Anglo-French Arbitration* Case, para. 108.

[3] See Maltese Counter-Memorial, pp. 67-68, paras. 134-135. Libya once again puts forward in the present case the argument which it advanced in the *Tunisia/Libya* case:

> "... the questions of geology and geography become of decisive importance since once the natural prolongation of a State is determined, delimitation becomes a simple matter of complying with the dictates of nature" (Pleadings, Vol. I, p. 487, para. 89).

The Court expressly stated that it is "unable to accept [this] contention" (*I.C.J. Report*, 1982, p. 47, para. 44).

> "... it is only the legal basis of the title to continental shelf rights – the mere distance from the coast – which can be taken into account as possibly having consequences for the claims of the Parties".[1]

It is true that Libya objects to this, saying that "the Court did not have recourse to any distance criterion in the delimitation between Tunisia and Libya".[2] This is correct, but Libya does not appear to have noticed the conclusion of the paragraph just quoted:

> "Both Parties rely on the principle of natural prolongation: they have not advanced any argument based on the 'trend' towards the distance principle. The definition in Article 76, paragraph 1, therefore affords no criterion for delimitation *in the present case*".[3]

How, after all that, can Libya say that "there is no so-called 'distance principle' in international law".[4] Any such assertion runs counter to all the evidence.

### (d) *Physical Features and State Practice*

40. It is not only the case law that Libya disregards. It also leaves State practice out of consideration, as Malta has shown in its Counter-Memorial.[5] It is sufficient to glance through the *Annex of Delimitation Agreements* produced by Libya to see that, apart from the Timor Trench,[6] geological and geomorphological configurations do not appear to have been treated by States as controlling the delimitation of their continental shelf boundaries. The agreement between France and Spain disregards the Cap Breton Trench.[7] The agreement between the United States and Mexico adopts a simplified equidistance line without reference to the Sigsbee Deep.[8] The agreement between Cuba and Haiti establishes an equidistance line which disregards the Cayman Trench.[9] The India–Thailand delimitation takes no account of the Andaman Basin.[10] The agreements between the Dominican Republic and Colombia and the Dominican Republic and Venezuela take no account of the Aruba Gap. The delimitation between the United States and Venezuela does not give any weight to the Venezuela Basin.[11] The delimitation between France and Venezuela uses a line of longitude which is unconnected with the geomorphology of the region.[12]

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[1] *I.C.J. Reports*, 1982, p. 48, para. 48.
[2] Libyan Counter-Memorial, p. 100, para. 4.51.
[3] Emphasis supplied.
[4] Libyan Counter-Memorial, p. 102, fn. 3.
[5] Maltese Counter-Memorial, pp. 70-74, paras. 144-150.
[6] Libyan Counter-Memorial, Annex of Delimitation Agreements, Annex 24.
[7] *Ibid.*, Annex 34.
[8] *Ibid.*, Annex 23.
[9] *Ibid.*, Annex 52; See also Maltese Memorial, Annex 55.
[10] *Ibid.*, Annex 59; See also Maltese Memorial, Annex 53.
[11] *Ibid.*, Annex 56; See also Maltese Memorial, Annex 52.
[12] *Ibid.*, Annex 67. See for details Annex 4 of this Reply.

71. As against these cases Libya notes that the line established by the agreement between Cuba and Mexico "also coincides generally with the Yucatan Channel, a deep geomorphological depression".[1] Yet a glance at the map is sufficient to show how wrong this interpretation is – the bolder because *the agreement states expressly that it has been drawn up on the basis of equidistance!* Annex 4 to this Reply shows that the agreed line is infact a median line ignoring completely the physical features of the area. As for the North Sea to which Malta has already referred,[2] both the Maltese and the Libyan maps show the extent to which the numerous delimitation agreements in this area are independent of the configuration of the seabed.[3]

## 3. COASTAL GEOGRAPHY

### (a) *Coasts and Not Landmass Generate Entitlement*

72. The Libyan Counter-Memorial does not stop at tying entitlement – and thus delimitation – to geology and geomorphology. As has already been pointed out, it adds a new dimension to the concept of prolongation: geography – and it sees in the coasts both "the basis of continental shelf entitlement"[4] and an element of "major importance ... in any delimitation of the continental shelf".[5]

73. Malta, of course, would welcome this acceptance by Libya of "the importance of the coasts", "the major importance of the coasts of the Parties", "the coastal basis of continental shelf entitlement",[6] if, on the one hand, this acceptance is accompanied by a correlative abandonment of the geological and geomorphological approach, and if, on the other, the word "coast" were not given a very special meaning in Libya's vocabulary. The Libyan Counter-Memorial certainly speaks of "coasts" – and it is right to do so. But it sees this word as synonymous either with the "landmass behind the coasts" or with "coastal lengths". For the "geographical configuration of the coastlines" which the Court sought to examine closely,[7] Libya thus substitutes two other concepts: the first is that of the "landmass behind the coasts", which has only a verbal relationship with the idea of coasts; and the second is that of "coastal lengths", which favours only one particular aspect of coastal configuration and which serves entirely to deprive basepoints of their proper role. The Counter-Memorial does not deal in any way with the relationship between coasts and distance.

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[1] *Ibid.*, Annex 47; See also Maltese Memorial, Annex 23.

[2] Maltese Counter-Memorial, p. 73, para. 148.

[3] See Reduced Map No. 1 at page 72 of the Maltese Counter-Memorial and Annex 12 of the Annex of Delimitation Agreements of the Libyan Counter-Memorial. For ease of reference the map is reproduced in this Reply as Map No. 1 at page 40.

[4] Libyan Counter-Memorial, p. 84, para. 4.18.

[5] *Ibid.*, p. 32, para. 2.29.

[6] *Ibid.*, pp. 32, 38 and 83 respectively.

[7] *I.C.J. Reports* 1969, p. 51, para. 96.

74. Before examining Libya's attempt to change the nature of the concept of "coasts", it is necessary to observe that the theme of coastal geography lies on an entirely different plane from that of the "Rift Zone" and of the Escarpments–Fault Zone. It is not a matter, this time, of justifying the quasi-enclavement of Malta within the alleged natural geological and geomorphological prolongations, but of justifying a non-equidistance delimitation based upon a criterion of proportionality. The purpose here is to confront the insignificance of the small island group of Malta with the importance of the immense Libyan continental landmass. By dint of repeating that Malta is small and Libya large, Libya hopes to persuade the Court to draw broad legal consequences from this statement of the obvious: if Malta is so small and Libya so large, is it not inequitable to adopt an equidistance delimitation which will give equal weight to the two countries, and which will divide the continental shelf between them accordingly? Would it not be more equitable to abandon this approach in favour of one based upon proportionality?

75. Malta would not for a moment think of comparing itself with Libya by reference either to the area of its territory or the length of its coasts. Certainly Malta is a small island State while Libya is a huge continental one. But what is the relevance of this on the legal plane? The law does not demand a just and equitable division which would, according to the subjective opinion of the judges about distributive justice, attribute to each State a part of the continental shelf proportional or, on the contrary, in inverse proportion to its size or the length of its coasts, or its economic power. The question to be decided is what are, according to international law, the consequences to be drawn from the reference to size which Libya repeats untiringly from the first to the last page of its Pleadings. In other words, what is the legal impact of the differences in area and coastal length of insular Malta and continental Libya on the delimitation of their respective areas of continental shelf? Malta will answer this in more detail presently.

76. The first Libyan modification that calls for comment concerns the concept of "coasts": "coasts" becomes "the landmass behind the coasts". This assimilation had already appeared in the Libyan Memorial, and Malta has already taken the opportunity of criticizing it in its Counter-Memorial.[1] In the Libyan Counter-Memorial this assimilation is given a quite unexpected prominence and the theme constantly reappears as a leitmotiv.[2] Two quotations will suffice by way of illustration:

> "... the extent of the land territory behind the coast must be regarded as linked to the factor of the natural prolongation ... the land territory behind Libya's extensive coast is immense, whereas

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[1] Maltese Counter-Memorial, pp. 50–51, paras. 87–88.

[2] Libyan Counter-Memorial, p. 25, para. 2.10; p. 38, para. 2.42; pp. 40–42, paras. 2.46–2.50; p. 83, para. 4.16; p. 84, paras. 4.18 and 4.19; pp. 85–86, paras. 4.21–4.23; p. 87, para. 4.25; p. 90, para. 4.30.

> both the coast and land territory of Malta are very small. Surely, *the intensity of the natural prolongation must be greater – the prolongation, more natural – from the Libyan coast in arriving at a line of delimitation*".[1]
>
> "It is the landmass behind the coast which ... provides the factual basis and legal justification for a State's entitlement to continental shelf rights over maritime areas before its coast ...".[2]

77. The rendering of "coasts" by "the landmass behing the coasts" rests on an evidently false basis. It is not the landmass of the State which confers maritime rights upon it, but the fact that it possesses *coasts*. Maritime rights flow not from the quality of being a State but from that of being a *coastal* State. It is the existence of a coastal façade which generates maritime rights, and not the existence of a territorial mass or *hinterland* behind this façade. A landlocked State of even enormous area acquires no maritime rights simply from the fact that it possesses a large landmass; and conversely a coastal State has the same maritime rights regardless of whether its territory penetrates deeply into the interior of the continent or is merely a narrow strip alongside the sea. The Court said this clearly in 1969:

> "... the land dominates the sea: it is consequently necessary to examine closely the geographical configuration of the coastlines of the countries whose continental shelves are to be delimited".[3]

One may thus see that it is not the size of the landmass that the Court feels must be examined closely, but the "geographical configuration of the coastlines". Certainly "the land dominates the sea"; but this is a matter of "land territory", that is to say a political concept, and not of the "landmass" in its physical sense. It was of the "natural prolongation of the land territory" that the Court spoke in 1969,[4] and not of the "natural prolongation of the landmass". The Anglo-French Court of Arbitration confirmed this in a passage which has already been quoted:

> "In international law ... the concept of the continental shelf is a juridical concept which connotes the natural prolongation under the sea *not of a* continent or *geographical landmass* but of the land territory of each State".[5]

Libya distorts the law in pretending that the source of continental shelf rights of a State lies in its territorial mass and in presenting natural prolongation as being not that of the territory of the State in the legal and political sense of the term, but that of the land area in the geographical sense of the word. No, it is not "the *landmass* behind the coastline ... which provides the ... legal justification for a State's entitlement to continental shelf rights ...",[1] but, as the Court has said, "the geographic correlation between *coast* and submerged areas off the coast".[2]

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[1] *Ibid.*, p. 41, para. 2.48, Emphasis supplied.

[2] *Ibid.*, p. 84, para. 4.19.

[3] *I.C.J. Reports* 1969, p. 51, para. 96.

[4] *Ibid.*, p. 22, para. 19.

[5] *Anglo-French Continental Shelf Arbitration*, para. 191. Emphasis supplied.

78. Since continental shelf rights are derived *not* from the *landmass* but from the *coasts*, the area of continental shelf rights belonging to a coastal State has nothing to do with the area of its landmass. It is the character of the coasts which determines the extent of the areas of continental shelf belonging to each coastal State and that alone. There is no correlation between the area of the coastal State and the area of its continental shelf, or indeed, more generally, the area of all its maritime jurisdictions. The two matters are quite independent of each other and the ratio between the area of the State and that of its continental shelf or of its economic zone may vary considerably from one situation to another. A small island located in the middle of an ocean may generate areas of maritime jurisdiction which are considerable in comparison with its area. Thus the Island of Nauru, with an area of 21 square kilometres, gives rise to an exclusive economic zone nearly ten thousand times larger than itself.[3]

### (b) *Landmass Irrelevant for the Purposes of Delimitation*

79. This observation is true when the State concerned is able to benefit from the whole of its entitlement. It is no less true when the case is one involving a delimitation between neighbouring States: in no case has this delimitation ever involved identifying a correlation between the area of the landmass and that of the continental shelf. It may be recalled in passing that the historical evolution of the territorial sea was not marked by any proposal that its outer limit should depend either on the length of the respective coasts of opposite States or on their relative size. In cases of delimitation between opposite or adjacent coasts, the practice of States does not appear to give weight to the size of the landmass. The Soviet Union, for example, has made delimitation agreements on the basis of equidistance with Finland, Poland and Norway[4] without the gigantic landmass of the Soviet Union having been used to give the latter any advantage. Much the same is true for the United States in relation to its agreements with Mexico and Cuba.[5] A glance at the *Annex of Delimitation Agreements* appended to the Libyan Counter-Memorial serves to show that there are many cases in which the considerable disproportion in the size of the parties to the

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[1] Libyan Counter-Memorial, p. 84, para. 4.19.

[2] *I.C.J. Report*, 1982, p. 61, para. 73.

[3] See Lucchini and M. Voelckel, *Les Etats et la Mer*, Paris *La Documentation Française*, 1978, p. 71.

[4] Libyan Counter-Memorial, Annexes Nos. 9, 20 and 4 respectively.

[5] *Ibid.*, Annexes Nos. 23 and 53.

agreement finds no reflection in the settlement.[1] One may also note that the Federal Republic of Germany never invoked the greater size of its land territory in its claims against Denmark and the Netherlands in the *North Sea Continental Shelf* Cases.

80. It may be added too that if one were to attach legal importance, whether in the basis of title or in the delimitation of the continental shelf, to the area of the landmass, one would risk finding on a number of occasions that there is a contradiction with another geographical aspect of the situation to which Libya attaches great importance in its conception of natural prolongation, namely, the length of the coastlines. A State may have a large landmass but a short coastal façade; or, on the contrary, a small landmass which stretches all the way along an extended coastal front. Between these two factors, which Libya suggests are linked[2], there is no logical or necessary relationship. The Libyan argument on this point is quite simply unintelligible.

81. The Libyan argument regarding its landmass is affected by a double error. The first lies in maintaining that it is the landmass which constitutes "the legal justification for a State's entitlement to continental shelf rights"; the second lies in the contention that there exists a necessary correlation – in other words a necessary proportion – between the area of a State's territory and the area of its continental shelf. Libya tries to link the landmass to the coasts by speaking systematically of "the landmass behind the coasts"; but this does not serve to provide a legal foundation for its argument. It is the relationship between the submerged areas and the *coasts* which is the legal basis for the rights of the coastal State and not the relationship between the submerged areas and the territories lying landward of or "behind" the coasts. Libya's case is not improved by linking the area of the landmass to the natural prolongation or by arguing that the greater the landmass the more the natural prolongation is "intense" and "natural". The idea clearly advanced in the Counter-Memorial that Libya's natural prolongation would by reason of the greater size of its land territory be more intense and "more natural"[3] than that of Malta is truly staggering. To borrow a Libyan expression, this is an "unfathomable statement".[4]

82. One last comment may be made regarding Libya's emphasis on

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[1] See for example the following Agreements: Iran–Qatar (Annex 21); Australia–Indonesia (Annex 24); Bahrain–Iran (Annex 25); Argentina–Uruguay (Annex 32); Iran–Oman (Annex 40); India–Indonesia (Annex 41); India–Maldives (Annex 49); Netherlands–Venezuela (Annex 57); and Australia–Papua New Guinea (Annex 60). Almost all these agreements had already been reproduced by Malta in Annexes to its Memorial, but for ease of reference the numbers here given are those of the Libyan Annex of Delimitation Agreements.

[2] See, e.g., Libyan Counter-Memorial, p. 25, para. 2.10; p. 41, para. 2.48; p. 42, para. 2.50; p. 84, para. 4.18.

[3] *Ibid.*, p. 41, para. 2.48.

[4] *Ibid.*, p. 26, fn. 2.

the landmass behind the coasts. The Libyan proposition that minuscule Malta is not entitled to as extended a continental shelf as immense Libya is entirely fallacious. Quite apart from the obvious fact that even an equidistance line would leave to Libya an area of continental shelf very much larger than that of Malta, the question of the relative area of the two States is entirely without legal pertinence.

83. After the unjustified assimilation of "coasts" with "the landmass behind the coasts", there occurs a second assimilation, more subtle but no less misleading, of "coasts" with "coastal lengths". The argument runs that the coasts of Malta are much shorter than those of Libya, and therefore one should replace the equidistance method with one based on or coinciding with a delimitation that is proportional to the coastal lengths of the two States. The question of proportionality will be examined in greater detail later. At this point the Libyan argument will be examined from a different angle.

### (c) *Coasts and Distance from Coasts are the Relevant Considerations*

84. It is, of course, true that coasts occupy a central place in identifying entitlement to, and delimitation of, the continental shelf. But this proposition requires clarification in two respects. First, it is necessary to take account of the configuration of the coasts as a whole and not accord a special position to merely one aspect of this configuration. As will be seen the emphasis placed by Libya of the single aspect of the length of the coast and the correlative tendency to minimize the role of basepoints which reflect the configuration of the coast are not acceptable. Second, it is by reference to the sea areas which lie off the coasts that the latter have any importance, so much so that it is in the distance from the coasts that one finds the legal basis of title to the offshore areas and thus the point of departure for delimitation. It is not the length of the coasts by themselves, taken without reference to the element of distance, that matters.

85. This last point appears with particular clarity in the observations of the Court in the *Tunisia/Libya* judgment. The Court said that the continental shelf embraces "any seabed area possessing a particular *relationship with the coastline* ...".[1] "The geographic *correlation between coast and submerged areas* off the coast is the coastal State's legal title".[2] It is thus the spatial relationship between the coast and the offshore areas which is the source of the rights of the coastal State, and not merely coastal length in itself. The Court added:

> "As has been explained in connection with the concept of natural prolongation, the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it".[3]

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[1] *I.C.J. Reports*, 1982, p. 45, para. 41.

[2] *Ibid.*, p. 61, para. 73. Emphasis supplied.

[3] *Ibid.*

The explanation given "in connection with the concept of natural prolongation" is precisely that – leaving aside broad-margin situations (which are not relevant here) –

> "... the distance from the baseline, measured on the surface of the sea, is the basis for the title of the coastal State... [and] it is only the legal basis of title to continental shelf rights – the mere distance from the coast – which can be taken into account as possibly having consequences for the claims of the Parties".[1]

"Therefore", the Court added,

> "the coast of each of the Parties ... constitutes the starting line from which one has to set out in order to ascertain how far the submarine areas appertaining to each of them extend in a seaward direction, as well as in relation to neighbouring States...".[2]

Here is a clear statement that continental shelf rights, whether extending without restraint into the open sea or limited by reference to a neighbouring State, are controlled by the concept of distance from the coasts.

86. Looking at the matter more closely, it will be observed that the distance of which the Court speaks is not measured from the very coast itself but is rather a "distance from the baseline". Article 76(1) of the 1982 Convention provides in the same way that the continental shelf of a coastal State extends "to a distance of 200 nautical miles *from the baselines* from which the breadth of the territorial sea is measured". A comparable form of words appears in relation to the breadth of the exclusive economic zone in Article 57 of the same convention. There is thus a striking identity between the points or lines from which the territorial sea, the continental shelf and the economic zone are all measured. In other words, we have here three areas of maritime rights which are defined by reference to the combination of coasts and distance. The explanation of this similarity is simple: the basepoints and baselines from which the territorial sea is measured – and likewise from which the continental shelf and the economic zone are measured – are not determined arbitrarily. They are used because, and to the extent that, they represent the coasts. The rules governing their determination have been the subject of extended customary and treaty consideration with a view to achieving exactly this representative quality.

### (d) *The Equality of the Seaward Projection of Coasts*

87. But the combination of distance and coasts has another important consequence: where a constant distance is used to define the seaward extension of a coastal State, its maritime zone extends in every direction within the prescribed distance. No one direction is legally

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[1] *Ibid.*, p. 48, para. 48.

[2] *Ibid.*, p. 61, para. 74.

more significant than any other. The maritime zone of a coastal State within this framework is not to be thought of as a platform in front of its coast, but as a broad belt of sea surrounding its territory in every direction. This equality of seaward projection of the coasts occurs every time that a maritime area is defined in terms of distance. This was the case with the territorial sea which the "cannon-shot rule" led jurists to consider from the 17th century onwards as "a belt of sea adjacent to the land".[1] The same is true for the exclusive economic zone. It was not so for the continental shelf so long as the latter was defined by reference to depth or exploitability. Now, however, that the continental shelf has come to be defined also by reference to distance from the coasts (at least in the most common case and in any event in the Pelagian Sea), the concept of equal radial projection applies also to it. In the case of a continental State the idea of radial projection can be implemented only from the coastal front, but it operates in all directions until it meets, according to the situation, the radial projection starting from the coastal front of another State. In the case of an island, which by definition is " an area of land, surrounded by water" (Article 121 of the 1982 Convention), the radial projection extends in all directions around the island, and the idea of a "belt" – the word used by the Court in relation to the territorial sea[2] – assumes its full meaning. This is why island States with a small area are capable of generating very large areas of maritime jurisdiction.

88. The radial jurisdiction which characterizes entitlement to maritime zones under the principle of the relationship between coasts and sea areas[3] is applied by the method of envelopes of arcs of circles adopted to define the outer limit of these zones.

89. This method was first established, as was natural, for the territorial sea. This was the method described by Whittmore Boggs,[4] by Fritz Münch,[5] and by Gilbert Gidel.[6] It was also the method put forward by the United States delegation to the League of Nations Conference on the Codification of International Law at The Hague in 1930. The Court described it in 1951 in the Judgment in the *Fisheries* case, though stating that "it is not obligatory in Law".[7] The Committee of Experts consulted by the International Law Commission defined this method as consisting in drawing

> "... a line, every point of which is at a distance of T miles (the breadth of the territorial sea) from the nearest point of the baseline.

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[1] O'Connell, *The International Law of the Sea*, Vol. 1, Edited by J. A. Shearer, 1982, p. 127.

[2] *I.C.J. Reports*, 1959, p. 128.

[3] See para. 85 above.

[4] Delimitation of the Territorial Sea, *American Journal of International Law*, Vol. 24 (1930), p. 541.

[5] *Die Technichen Fragen des Kustenmeers*, Kiel, 1934.

[6] *Le droit International public de la mer*, *Vol. III* (1934), p. 503.

[7] *I.C.J. Reports* 1951, p. 129.

> It constitutes a continuous series of intersecting arcs of circle chain with a radius of T miles from all points on the baseline. The limit of the territorial sea is formed by the most seaward arcs".[1]

The International Law Commission recommended its adoption.[2] It became the legally compulsory method with the entry into force of Article 6 of the 1958 Convention on the Territorial Sea and Contiguous Zone, the terms of which reappear in Article 4 of the 1982 Convention on the Law of the Sea:

> "The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea".

90. Conceived by the technical experts in order to meet practical needs, the method of envelopes of arcs of circles thus became the appropriate legal rule for the territorial sea not later than 1958. However, it is capable of wider application and may be extended to the delimitation of all areas of maritime jurisdiction, entitlement to which rests on the spatial relationship between a maritime area and coasts, especially the exclusive economic zone. The 1982 Convention does not, it is true, contain any provision establishing the outer limit of the exclusive economic zone comparable to the one contained in Article 4 dealing with the limits of the territorial sea, but one may assume that the same technical method is applicable to both.[3] For the same reason this method naturally lends itself to use in drawing the outer limit of the continental shelf, except where the outer limit of a continental margin lies more than 200 nautical miles from the baseline.

91. The link between the method of the envelope of arcs of circles and the radial approach to all areas of maritime jurisdiction is evident. Judge Read shed light on the matter in his dissenting opinion in the *Fisheries* case in 1951:

> "In the earliest days, the cannon on the coast, when traversed, traced arcs by the splash of their shots. Later, the imaginary cannon traced imaginary arcs which intersected and marked out the limit based on cannon shot".[4]

Subsequently, Professor O'Connell stressed that this method

> "... is intrinsic in the cannon-shot theory, the assumption being that the sea is reduced to control within the intersection of the arcs of traverse of coastal guns. The range of the guns ... would then provide a notional line of fall of shot which would not be a parallel trace of the coast, but an envelope of arcs of circles".[5]

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[1] *Yearbook of the International Law Commission, 1953*, Vol. II, p. 79.

[2] *Yearbook of the International Law Commission 1956*, Vol. II, p. 268.

[3] cf. Caflish in *Le nouveau droit international de la mer*. Paris, Pedone, 1983, p. 85.

[4] *I.C.J. Reports*, 1951, p. 192.

[5] Op. cit., p. 230.

92. The method of envelope of arcs of circles presents a number of special features which the authors just cited have emphasized.

93. The first is its geometrical and scientifically certain character. As Boggs wrote, "there is one and only one such line which can be drawn in front of any coast".[1]

94. Secondly, since it is the *envelope* of the arcs of circles drawn from all points on the baselines which is alone operative, those arcs of circles which lie landwards of this envelope have no influence on the construction of the outer limit, and the points from which these arcs were drawn are ultimately of no value in the determination of the line. They are in effect lost. This shows that it is not all the points of the base *line* which are in the end determinative, but only certain base *points* – in effect the salient points of the coast.[2] The number of basepoints relevant to the construction of the outer limit will vary according to the configuration of the coast, and each basepoint may vary from the others in the length of outer limit which it controls.

95. The features just mentioned have not, as we have seen, prevented the method of the envelope of arcs of circles from rising from the level of a convenient technical procedure to that of a method required by law. It was unanimously adopted by the International Law Commission in relation to the territorial sea. The 1958 Conference, and then the Third UN Conference on the Law of the Sea, had no difficulty in reaffirming it. Nor has the prospect of its applicability to the exclusive economic zone ever occasioned the least doubt. This consensus is significant. It is evident that neither States nor publicists have viewed the fact that only certain basepoints control the line of envelopes of arcs of circles as in any way weakening the propriety of recourse to the method. Certainly they have not felt that the only line acceptable for the outer limits of the territorial sea is one which must be totally parallel to the baseline and reflecting every part in it. The system of *basepoints* does not appear to have been regarded as jeopardizing the link between the outer limit of the maritime zones and the coastal configuration.

### (e) *Entitlement is Measured from Basepoints and in all Directions.*

96. It can thus be seen how greatly in error Libya is when it criticizes Malta because it "substitutes basepoints ... for the coast as the basis of continental shelf entitlement"[3] and for resorting to "multiple use of a single basepoint ... to create the illusion of a long coast when in actuality only a short coast is involved".[4] In this connection the Libyan

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[1] Op. cit., p. 545.

[2] Cf. Gidel, op. cit., p. 510; Boggs, Delimitation of Seaward Areas under National Jurisdiction, *American Journal of International Law*, Vol. 45 (1951), p. 240, at p. 250.

[3] Libyan Counter-Memorial, p. 84, para. 4.18.

[4] *Ibid.*, p. 159, para. 7.23.

Counter-Memorial says:

> "Legal entitlement arises not from 'basepoints' but from the natural prolongation of the land territory of the State and its coastal extent into and under the sea".[1]
>
> "Natural prolongation starts from the coasts of the Parties and not from baselines or basepoints".[2]

Libya forgets that the outer limit is always drawn from certain basepoints and not from all the points on the coast or on the baseline. The choice of these basepoints is in no way arbitrary. It is imposed by geography and every geographer would reach the same result in relation to any given coast. These basepoints are in truth representative of the coast, and the Libyan argument, which attempts to place "basepoints" in opposition to "coasts" as a source of legal entitlement to continental shelf rights, simply does not make sense.

97. The Libyan approach to the question of "coasts" may thus be seen as resting upon a complete misunderstanding of the basis of legal entitlement. Whatever their length, Malta's coasts generate equally a seaward extension in all directions, as much towards the east as any other direction, and these projections are to be determined according to the method of the envelopes of arcs of circles based on control points located on straight baselines. The number of these points matters little.[3] Nor does it matter much whether these points are used only once or more than once for a larger or smaller part of the envelope. Everything is determined by geography and law. There is nothing abnormal in a short coast generating an extensive maritime zone. That is the conjoint effect of the radial projection and of the method of envelopes of arcs of circles. This is what explains, it is necessary to repeat, why an island State can attract considerable maritime areas, even though it possesses only a modest length of coastline.

### (f) *Malta's entitlement is delimited only by the equal entitlement of neighbouring States.*

98. The error committed by Libya on the plane of entitlement also has repercussions on the plane of delimitation. Malta's entitlement cannot open out freely in the limited space in which it is situate. Its continental shelf cannot extend to 200 miles from the baselines. The same is true for Libya. In 1969 the Court said that "delimitation is to be effected ... in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural pro-

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[1] *Ibid.*, p. 37, para. 2.39.

[2] *Ibid.*, p. 42, para. 2.49.

[3] Libya has itself recognized this consideration in its comment on the delimitation between Norway and Denmark in respect of the Faroes: "... indeed the delimitation line in this instance is in all likelihood governed by a single point on the Norwegian coast." (Libyan Counter-Memorial p. 125, para. 5.66).

longation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other".[1] This means, in today's legal context, that delimitation must leave to Malta as much as possible of its entitlement to a continental shelf of 200 miles from its baselines without encroachment on a similar right of equal validity possessed by Libya. The extent of Malta's continental shelf vis-à-vis Libya is thus determined by the conjunction of two considerations: first, the necessity to restrain the maritime extension to which it would be entitled if it were not situated in what Libya calls a "constricted setting" or a "confined area"[2]; second, the necessity to treat Malta on a footing of equality with Libya, in the sense that since the entitlement of each has the same validity as that of the other, the sacrifice which each must accept by reason of the geographical context must be the same as that of the other.

99. It is not because the coasts of Malta are shorter than those of Libya that the seaward extension from Maltese basepoints should be more restricted than the seaward extension from Libyan basepoints. It is not because Malta's coasts are shorter than those of Libya that the seaward extension from Maltese basepoints should stretch only in a frontal direction towards the Libyan coast between Ras Ajdir and Ras Zarrouq. This direction is no more suitable or appropriate than any other. The maritime extension of Malta from its basepoints stretches as much in a southwesterly and westerly and in a southeasterly and easterly direction, as in a southerly direction, until it meets an extension of equal validity from, as the case may be, Libyan, Tunisian or Italian basepoints. Libya's claim to terminate Malta's extension at a longitude of approximately 16° has no more justification from the point of view of seaward extensions from coasts generally than it has from that of the interruption of a geological and geomorphological natural prolongation. Nor can the fact that Malta's coasts are shorter than those of Libya justify the claim that the maritime boundary between the two countries should pass within some 15 nautical miles of Malta's coasts and more than 160 miles from those of Libya. Such a delimitation would be a strange way of respecting coastal geography.

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[1] *I.C.J. Reports*, 1969, p. 53, para. 101.

[2] Libyan Counter-Memorial p. 28, para. 2.17 and p. 41, para. 2.47.

# CHAPTER VI

# THE EQUIDISTANCE METHOD

## 1. IMAGINARY LIBYAN ARGUMENT

100. The Libyan Counter-Memorial criticizes Malta for arguing that "the equidistance method is obligatory in the present case"; for its "attempt to confer on equidistance a compelling, mandatory character"; for maintaining that "between States with opposite coasts, the law requires a median line"; for adopting afresh the contention – rejected by the Court – of The Netherlands and Denmark; and for seeking to "reassert equidistance as a rule and to treat equidistance as synonymous with an equitable result".[1] Following this criticism, the Libyan Counter-Memorial makes a major effort to establish that "neither equidistance nor any other method has an obligatory character in continental shelf delimitation" and devotes a whole chapter to this attempt.[2]

101. Once again, Libya is here tilting at an imaginary Maltese argument. Malta has never argued that equidistance has a legally obligatory character, either in relation to opposite or adjacent States. Malta has not reasserted the fundamental and inherent character of this method. Malta has not denied that in certain situations the equidistance method might lead to an unreasonable and inequitable result, or that it is then necessary to have recourse to variants of the method, or even to an alternative method. What Malta has argued is that the legal basis of title to continental shelf rights requires that, as a starting point of the delimitation process, consideration must be given to a line based on equidistance, since the equidistance method reflects the coastal configuration and accords due spatial weight to the combination of coasts and distance. But it is only to the extent that this primary delimitation, resting on the legal basis of title, produces an equitable result by a balancing up of the relevant circumstances of the case that the boundary coincides with the equidistance line.[3]

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[1] Libyan Counter-Memorial, p. 102, para. 5.01; p. 103, para. 5.05; p. 104, para. 5.09; p. 107, para. 5.18; p. 112, para. 5.33.

[2] *Ibid.*, pp. 102–135, paras. 5.01–5.97.

[3] See in particular Maltese Counter-Memorial, pp. 77–78, paras. 163–164; pp. 81–82, para. 172.

## 2. THE SO-CALLED "TRENDS AWAY FROM EQUIDISTANCE".

102. The Libyan Counter-Memorial does not stop at a lengthy restatement that the equidistance method does not have a legally binding character – all this being no more than a statement of the obvious, which Malta does not dispute; it goes further and argues that international law is daily moving further away from equidistance. It repeats such phrases as "the trends away from equidistance",[1] and "the decline in the reliance on equidistance".[2]

103. In attempting to support this argument, Libya turns first to the case law.[3] But what are the facts? Although it is true that the Court in the *Anglo–French Continental Shelf* case observed that *in certain cases* the equidistance method could lead to an inequitable result, it is no less true that the Court also observed that *in certain cases* this method leads to an equitable result. Both this Court and the Court of Arbitration have pointed out the advantages of the equidistance method. The 1977 Decision stated several times that in more than one sector the United Kingdom and France were in agreement that the median line method was appropriate, and went on in some instances to express its agreement with the views of the two Governments.[4] Moreover, the line established by the Decision was one based on equidistance, as much in the Channel as in the Atlantic region. As for this Court, it also had recourse to a variant of equidistance in the outer segment of the line between Tunisia and Libya. Malta would hardly have thought it necessary to recall these episodes had not the Libyan Counter-Memorial appeared to be denying their existence.

104. In support of its argument that the equidistance method is in decline, Libya has referred, secondly, to State practice – and this as much in a general way as in a manner specifically related to island States.[5] The treatment of State practice in the Libyan Counter-Memorial is highly distorted – to such an extent that the present Reply will deal with this aspect of the matter specifically in a separate part[6] and in an Annex.[7] It will there be shown that State practice confirms the importance which Malta attaches to equidistance.

105. Thirdly, the Libyan-Counter Memorial suggests that support may be found for the alleged decline of equidistance in the proceedings of the Third United Nations Conference on the Law of the Sea.[8] This support, so Libya suggests, may be found in the fact that in Article 83

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[1] Libyan Counter-Memorial, p. 101, para. 4.52; p. 102, para. 5.02.

[2] *Ibid.*, p. 108, para. 5.19; cf. p. 110, para. 5.27 and p. 112, para. 5.33.

[3] *Ibid.*, pp. 102–104, paras. 5.03–5.09.

[4] See e.g. paras. 15, 27, 87, 103, 111, 120 and 146 of the Decision.

[5] Libyan Counter-Memorial, pp. 104–110, paras. 5.10 – 5.28; pp. 117–135, paras. 5.49–5.97.

[6] Part VI.

[7] Annex 4.

[8] Libyan Counter-Memorial, pp. 111–112, paras. 5.29–5.33.

of the 1982 Convention "the reference to the equidistance or median line disappeared entirely".[1] In his dissenting opinion in the *Tunisia/Libya* case,[2] Judge Oda has set out in detail the relevant developments on this matter. Two points appear clearly from his analysis. First, the equidistance method is the only one to have been considered worthy of mention in the successive negotiating texts. Secondly, while it is true that mention of this method does not appear in the final text, one must not forget that this compromise text, adopted *in extremis* on the last day of the Tenth Session, no more refers to "equitable principles" than it does to equidistance. Thus, as Judge Oda has emphasized, it gave satisfaction to the two "schools of thought" which had opposed each other for years throughout the Conference – a satisfaction "essentially of a negative kind, i.e. pleasure that the opposing school has not been expressly vindicated".[3] If the Libyan contention, according to which the silence of Article 83 on the question of equidistance evidences the "decline" of this method were correct, one might equally assert that the silence of the same article on "equitable principles" should be interpreted as evidencing the "decline" of this notion also. In truth, neither the one nor the other of these conclusions can properly be drawn from the compromise text that constitutes Article 83 in its final form.

106. In short, the thesis of the "decline" of equidistance and of the "trends away from equidistance" rests on nothing more substantial than Libya's wishful thinking.

### 3. Equidistance and Equity

107 Not satisfied with developing its contention regarding the decline of equidistance as a method of drawing continental shelf boundaries, Libya has developed a number of criticisms of this method, so far-reaching that they amount in effect to an assertion that equidistance can *never* lead to an equitable solution, indeed that its very nature precludes such a possibility. Libya thus falls into the grave mistake, already pointed out by Malta, of jumping from the fact that equidistance is *sometimes* inequitable – which is true – to the conclusion that it is necessarily *always* so – which is not true.[4]

108. Thus, according to Libya:

> "... the equidistance method by its very nature fails to take account of the physical factors and other relevant circumstances, and even ignores geographical factors such as coastal lengths". [5]

Equidistance, so Libya states,

> "cannot take account of other relevant factors such as geormo-

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[1] *Ibid.*, p. 112, para. 5.32.

[2] *I.C.J. Reports*, 1982, pp. 234–247.

[3] *Ibid.*, p. 246.

[4] Cf. Maltese-Counter Memorial, p. 78, para. 164.

[5] Libyan-Counter Memorial, p. 23, para. 2.04; pp. 151–152, paras. 7.04–7.05.

> phology, geology, physical appurtenance of shelf to landmass, conduct of the Parties, effect of delimitations with third States or the element of proportionality".[1]

If this criticism were justified, equidistance could *never* be used, and it would be impossible to understand either why Governments have several times – indeed even often – used it in their boundary agreements (as the Court has itself noted in its 1982 judgment),[2] or why the cases have accorded it a place alongside other methods.

109. According to the Libyan Counter-Memorial, the equidistance method does not even have the merit of reflecting coastal geography.[3] In this assertion Libya really goes too far. If there is one advantage of the equidistance method which no one has hitherto contested, it is that it reflects the coastal configuration. As the Court has itself declared:

> "... it is the virtue – though it may also be the weakness – of the equidistance method to take full account of almost all variations in the relevant coastlines".[4]

There is no doubt that an equidistance line is controlled only by a number of basepoints. There is no doubt also that one or more basepoints may control the equidistance line over a significant part of its extension. But the equidistance method shares these characteristics with that of the envelope of arcs of circles. These features have not prevented the latter method from having been successfully used in practice before it was adopted as the rule for determining the outer limits of the territorial sea. It is difficult to understand how they are of such a nature as to render a delimitation based on equidistance *necessarily* inequitable.

110. In this perspective the criticism made by Libya of equidistance – that it does not take account of the respective lengths of the coasts and that it is in consequence necessarily inappropriate when the relevant coasts are not of comparable length[5] – appears to be beside the point. Delimitation must reflect coastal *geography*, and not, contrary to the Libyan view of the concept, the *lengths* of the coasts. But delimitation must also reflect the relationship between the maritime areas and the coasts as well as the geographical relationship between the coasts themselves. The use of basepoints to determine a line is justified precisely because it respects this double relationship. Depending on the coastal configuration, the line will be determined by a larger or smaller number of basepoints, variously spaced, and which may vary in number and spacing from one coast to another. The length, as such, of any particular coast has nothing to do with this question, since each

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[1] *Ibid.*, p. 152, para. 7.04.

[2] *I.C.J. Reports*, 1982, p. 79, para. 109. See also Annex.

[3] Libyan Counter-Memorial, p. 152, para. 7.04.

[4] *I.C.J. Reports*, 1982, p. 88, para. 126.

[5] Libyan Counter-Memorial, pp. 160–161, paras. 7.24–7.27.

basepoint on each coast is a source of "radiation" in all directions.[1] The fact that equidistance has been used by States without reference to the length of coastlines[2] by itself serves to contradict the Libyan contention that equidistance necessarily produces an inequitable result in situations where the coasts of the Parties are of significantly different lengths. The weakness of the Libyan position is readily verifiable by looking at Libya's own Annex of Delimitation Agreements.

111. As will presently be developed more fully in Part IV, the difference in the length of the relevant coastlines and the equitableness of an equidistance line in a given situation are matters which lie on different planes. It is possible that in one or another given situation an equidistance line may be inequitable – but this would be for reasons other than the difference in the length of the coastlines. Conversely, the difference in the length of the coastlines is not a feature which of itself excludes equidistance when this is justified by the coastal configuration[3] and is equitable on the basis of other relevant circumstances and by reference to the test of proportionality. It is one thing to say that the comparative length of coasts may in certain situations constitute a supplementary factor supporting an equidistant solution; it is another to maintain that the presence of coasts of different lengths necessarily renders an equidistance solution inequitable. No rule of law exists to invalidate an equidistance delimitation, which is justified for other reasons, by reference to the sole consideration that the two coasts involved are not of comparable length. In short, equality of coastal lengths is not a necessary legal condition for recourse to equidistance.

112. It is not necessary to dwell longer on the Libyan argument of the necessarily inequitable character of the use of equidistance, for the problem here is an entirely different one. It is that of determining whether the equidistance method, the use of which is required as a first step by virtue of the legal basis of title to continental shelf rights, leads in the present case – having regard to all the relevant circumstances – to a reasonable and equitable result. The use of equidistance in the present case does not lead to "results that appear on the face of them to be extraordinary, unnatural or unreasonable", to adopt the words of the Court in 1969.[4] In particular, the distorting effect which may in

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[1] In its Memorial in the *Tunisia/Libya* case, Libya wrote, very properly, that "it is the geographical features of the coastline of a State which provide basepoints employed in delimiting the outer limits of the territorial sea and ... of the continental shelf as well" (Pleadings, Vol. 1, p. 38, para. 92). This observation is equally valid for delimitations between opposite and adjacent States.

[2] See Annex 4 of this Reply.

[3] In the Memorial in the *Libya/Tunisia* case, Libya stated: "... the geographical configuration of a coast – whether concave or convex, whether primarily regular or highly irregular, containing gulfs, promontories or offshore islands or islets – may determine decisively whether, in particular circumstances, the equidistance method is equitable" (*ibid.*, para. 94). The Libyan statement of the relationship between coastal geography and equidistance was there stated more precisely than it is to-day; it was not tied to the *length of the coastline*.

[4] *I.C.J. Reports*, 1969, p. 23. para. 24.

certain circumstances be produced by a minor geographical feature on a lateral equidistance line, and which increases as the line moves towards the open sea, does not arise in the present case. The coasts of Malta and of Libya are obviously opposite each other, and not the slightest element of adjacency exists. We are not in the present case confronted by a minor coastal feature which "makes the equidistance line swing out laterally across [one State's] coastal front, cutting it off from areas situated directly before that front.[1] Indeed, quite the reverse; it is the Libyan line which manifestly produces such an effect by seeking to move the boundary so close towards Malta as to cut it off from areas which can properly be regarded as lying directly in front of its coasts.

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[1] *Ibid.*, pp. 31-32, para. 44.

# PART III

# REBUTTAL OF LIBYAN ARGUMENTS TENDING TO DISTORT THE GEOGRAPHICAL AND LEGAL FRAMEWORK OF THE PRESENT CASE

## CHAPTER VII

## RECOGNITION AND APPRECIATION OF GEOGRAPHICAL FACTORS

### 1. The Allegation of Malta's Neglect of Geographical Factors

113. It is a constant theme of the Libyan Counter-Memorial[1] that Malta's Memorial shows a "neglect" of geographical factors. However, when the particulars of the Libyan complaint of "neglect" are set forth it becomes immediately apparent that it is the interpretation and legal appreciation of the geographical factors which is the real source of contention. Thus the Libyan pleading in practice spends many pages examining Malta's arguments relating to geographical factors; but much of the substance of the Libyan Memorial is devoted to an attack upon the legal appreciation of the geography, geomorphology and geology of the case presented in Malta's Counter-Memorial.

114. The difference between the two Parties concerns the *nature and appreciation* of geographical facts and factors for purposes of continental shelf delimitation within a legal framework. Take for example, the concept of "coast". In the Libyan conception of proportionality, the only means by which Libyan coasts can be given legal significance and appropriate credit is to allow a delimitation which would give Libya a virtual monopoly of the seabed of the Pelagian Block and would deny Malta any appreciable seaward reach of jurisdiction. In accordance with this methodology Malta's coasts are given little or no weight for legal purposes. In Malta's view the argument relying upon proportionality (based upon the ratio of the lengths of coasts) is not a standard, objective, and obvious "geographical fact" or "factor". In the history of the law of the sea, and during the long evolution of the territorial sea as a concept, it was not once suggested that long coasts could produce proportionately broad belts of territorial sea as against opposite "short coast" States.

115. There is no warrant for assuming that for purposes of delimitation "geographical facts" involve only matters of detail and the measurement of incontrovertible data.

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[1] Libyan Counter-Memorial, pp. 22–42; 112–117 and 151–164.

## 2. THE GEOGRAPHICAL FRAMEWORK OF THIS CASE: THE APPROPRIATE LEGAL PERSPECTIVE

116. In the Maltese Counter-Memorial it was stated that the geographical framework of the delimitation to be effected is uncomplicated by the presence of Maltese islands near Libya or the existence of peninsulas.[1] The position was summed up in the following passages:

> "Two coastal States thus face one another in a very simple setting, in the absence of narrow seas or other special circumstances".[2]
>
> "There is in legal terms a complete absence of abnormal geographical features in the present case. There is nothing unusual in the existence of an island State; and the Mediterranean and Caribbean Seas and the Indian and Pacific Oceans encompass a good number of island States. Nor is there anything unusual about the Libyan coastline, which is obviously free from abnormalities. Moreover, the *relationship* of the Maltese and Libyan coastlines is quite unremarkable. As a matter of principle, only unusual features, which involve serious departures from the primary elements in the geographical framework, can be subjected to the process of abatement on equitable grounds. To resort to adjustments where nothing in the geographical situation justifies it would be to refashion geography and would involve a crude process of apportionment".[3]

117. These straightforward descriptions appear to have prompted Libya to respond by a series of repetitious counter-assertions.[4] Malta is content to reaffirm the characterisations quoted in the previous paragraph and to make certain observations on matters of principle.

118. Libya asserts that "the difference in size – and in particular in the lengths of relevant coastlines – is ... a key relevant circumstance in the present case".[5] This proposition is, of course, not a reference to geographical facts but a statement of a legal conclusion. Malta does not deny the difference in size and therefore the complaint of the Libyan Counter-Memorial is that Malta's views *of the law* differ from its own. In so far as States do differ in size, in terms of lengths of coasts or otherwise, such variations are not regarded as abnormal but rather the reverse. The juxtaposition of island States and mainland States, or large States and small States, is a familiar and normal aspect of geography and of international relations, and in this respect the relation of Malta and Libya is in no way exceptional.

119. The thinness of the reasoning in the Libyan Counter-Memorial

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[1] Maltese Memorial, p. 36, para. 114.

[2] *Ibid.*

[3] *Ibid.*, p. 128, para. 263.

[4] Libyan Counter-Memorial, pp. 22–42.

[5] Libyan Counter-Memorial, p. 25, para. 2.10.

is emphasised by the appearance of the assertion that "normality does not exist in geographical settings".[1] This is no more than a reference to the obvious fact that all situations are to some degree individual. But variations and different permutations will still encompass certain elements which are recognized as regularities, as normal combinations of circumstances. The existence of an island State opposite a long coast or mainland State is a normal situation, and there are examples in many regions of the world.[2] There is, however, a more substantial point to be considered. The question of geographical normality is not to be weighed in the abstract. The real question is: what is normal, or unusual, for purposes of the law relating to continental shelf delimitation? The jurisprudence available suggests that in the case of opposite States the presence of promontories or intervening islands constitutes a complication of the kind which calls for some modest adjustment of the delimitation which would otherwise be based upon equidistance. In the same way, the practice of States, which is reviewed elsewhere,[3] gives a strong indication that relative size, and differences in coastal lengths, do not constitute relevant factors for purposes of continental shelf delimitation. Such considerations are generally ignored in the practice of States.

### 3. The Continuing Significance of the Distinction Between Opposite and Adjacent States.

120. In its Memorial[4] Malta stated that "the principle that where the coasts of two States are opposite to one another the median line will normally bring about an equitable result has been explicitly recognised in all three delimitation cases so far decided by international tribunals". Moreover, this view was confirmed by a substantial body of the practice of States in situations which are legally comparable with the coastal relationships of Malta and Libya.[5]

121. In the same connection Malta pointed out that the factor of proportionality as expressed in terms of coastal ratios is inapplicable in the case of opposite States as a matter of principle,[6] and the opinion of Professor Bowett was invoked in the following passage:

> "The relevance of the proportionality factor is more difficult to assess. Clearly, it is entirely subservient to the primary criterion of

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[1] *Ibid.*, p. 27, para. 2.13. See also para. 2.14: "The word normal has no place in any geographical-geomorphological setting".

[2] Maltese Memorial, pp. 61–96. See also Maltese Counter-Memorial pp. 111–123, 145–146.

[3] Part VI of this Reply; see also para. 79 above and Annex 4.

[4] Pp. 59–60, paras. 181–183.

[5] Maltese Memorial, pp. 61–96. See also Maltese Counter-Memorial pp. 111–123; 145–146.

[6] Maltese Memorial, p. 125, para. 258.

'natural prolongation', so there can be no justification for ignoring the geological evidence and simply dividing the shelf according to coastal ratios. Nor, indeed, are such ratios to be calculated on actual coastal length, for the Court envisaged a 'coastal front', a line of general direction to the coast rather than a line following its sinuousities (so that islands may count for this purpose, as part of such a 'front'). Indeed, it would seem that the proportionality factor might only be applied, or be meaningful, in the case of adjacent States (not 'opposite') where the existence of a markedly concave or convex coastline will produce a cut-off effect if the equidistance principle is applied: that is to say, will allocate to one State shelf areas which in fact lie in front of, and are a prolongation of, the land territory of another".[1]

122. In its Counter-Memorial[2] the Libyan Government adopts a number of arguments with the object of contradicting the contention just described. The Libyan position can be summarised as follows:-

(a) In the first place, a number of propositions are rehearsed as though the Maltese Memorial had attacked them and rehabilitation was called for.

(b) There is a false assumption that, because there is no sharp legal dichotomy between the "opposite" and "adjacent" situations (a "practical" but not a "legal" difference), the difference has *no* legal consequences.

(c) The reader is not expected to notice that the "opposite" or "adjacent" issue, however it was formulated, occupied the substantial attention of the Courts concerned in all three of the relevant cases decided by international tribunals.

(d) The effect of the reasoning of the Court of Arbitration in the *Anglo-French Arbitration* is misreported.

(e) It is assumed that if the distinction between "opposite" and "adjacent" States is reduced in significance, this will adversely affect the equidistance method as a means of achieving an equitable solution.

These matters will now be examined one by one.

### (a) *Attacks upon a non-existent Maltese Thesis*

123. In a series of paragraphs[3] the Libyan Counter-Memorial explains that the "legal principle" is the same both in the case of "opposite" and "adjacent" coasts[4]; that "in terms of geometry the exercise [is] the same";[5] that "there [is] a practical difference but no

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[1] *The Regime of Islands in International Law* (1978), p. 164.

[2] Pp. 102, 112–117.

[3] Libyan Counter-Memorial, pp. 112–117, paras. 5.34–5.48.

[4] *Ibid.*, para. 5.34.

[5] *Ibid.*

legal difference";[1] and that "there is no sharp dichotomy between opposite and adjacent coasts".[2] These assertions form part of an attack on a "Maltese thesis" which does not exist. It can be agreed that in a certain sense, and particularly in a geometrical sense, the "legal principle" is the same in both cases and the difference is "practical"; but this is really changing categories without changing the substance of the matter. The statement that in fact certain situations are hybrid, and that there is no "sharp dichotomy" between "opposite" and "adjacent" coasts, is not a statement that there is *no* difference.

### (b) *The Consequence of the Dichotomy Between "Opposite" and "Adjacent" Situations*

124. In the context of delimitation in accordance with equitable principles, the difference in geographical circumstances is crucial and this remains so whether a particular variation is described as "legal" or "practical". The Libyan argument becomes a caricature of itself in the concluding paragraph.[3] There it is stated that "there has never been any legal difference between opposite or adjacent coasts ... except in the purely practical sense that Courts acknowledged the increased risk of distortion with a lateral line and therefore accepted the need to offset any such distortion by a careful balancing of all the equitable considerations". Here, "the purely practical sense" involves *legal* consequences – the offsetting "of any such distortion" in the case of a "lateral line". The logic of the Libyan whole pleading collapses utterly at this point, since there can be no question of "distortion" unless there is a concept of a primary boundary indicated by the major aspects of the coastal geography. In the case of a median line between "opposite" coasts there is no cause of distortion, apart from the incidence of "islets, rocks and minor coastal projections".[4] The reference to "a lateral line" in the quotation above assumes both a primary boundary which reflects coastal geography and a critical difference between "opposite" and "adjacent" coasts.

### (c) *The Rôle of the Distinction Between "Opposite" and "Adjacent" States in Cases Decided by International Tribunals.*

125. The insistence of the Libyan Counter-Memorial on "the progressive disappearance of *any distinction*[5] between 'opposite' and 'adjacent' States[6]" involves a bold dismissal of the undeniable: in the three cases decided so far by international tribunals, the Courts involved

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[1] *Ibid.*, paras. 5.39, 5.41.

[2] *Ibid.*, para. 5.44.

[3] Libyan Counter-Memorial, p. 117, para. 5.48.

[4] *North Sea Continental Shelf* cases, *I.C.J. Reports*, 1969, p. 36, para. 57.

[5] Emphasis supplied.

[6] Libyan Counter-Memorial, pp. 102, para. 5.02, 112 (heading).

were much concerned with the identification of geographical situations in terms of "opposite" or "adjacent" States. The significance of the distinction as a matter of principle was given clear recognition in the following passage in the Judgment of the Court in the *Tunisia-Libya Continental Shelf* case:–

> "While, as the Court has already explained (paragraphs 109–110), there is no mandatory rule of customary international law requiring delimitation to be on an equidistance basis, it should be recognised that it is the virtue – though it may also be the weakness – of the equidistance method to take full account of almost all variations in the relevant coast-lines. Furthermore, the Court in its 1969 Judgment recognised that there was much less difficulty entailed in a general application of the equidistance method in the case of coasts opposite to one another, when the equidistance line becomes a median line, than in the case of adjacent States (*I.C.J. Reports, 1969*, pp. 36–37, para. 57). *The major change in direction undergone by the coast of Tunisia seems to the Court to go some way, though not the whole way, towards transforming the relationship of Libya and Tunisia from that of adjacent States to that of opposite States, and thus to produce a situation in which the position of an equidistance line becomes a factor to be given more weight in the balancing of equitable considerations than would otherwise be the case.*"[1]

So much for the so-called "progressive disappearance" of the distinction between "opposite" and "adjacent" States.

### (d) *The Reasoning of the Court in the Anglo-French Continental Shelf Arbitration.*

126. In its treatment of the views expressed by the Court of Arbitration in the *Anglo-French Continental Shelf Arbitration*, the Libyan Counter-Memorial[2] fails to convey the nature of the exercise. The Court of Arbitration was applying the provisions of Article 6 of the Continental Shelf Convention to the Atlantic region. In so doing it was concerned to make two points:-

(a) "Whether the Atlantic region is considered, legally, to be a case of 'opposite' States governed by paragraph 1 or a case of 'adjacent' States governed by paragraph 2 of Article 6, appreciation of the effects of any special geographical features on the equidistance line has to take account of these two geographical facts: the lateral relation of the two coasts and the great distance which the continental shelf extends seawards from those coasts".[3]

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[1] *I.C.J. Reports*, 1982, p. 88, para. 126. See further the Judgment at p. 61, para. 74. Emphasis supplied.

[2] Pp. 114–116, paras. 5.41–5.43.

[3] *Decision* of 30 June 1977, para. 241; and see also para. 242 *in fine*.

(b) "In so far as the point may be thought to have importance, the Court is inclined to the opinion that the Atlantic region falls within the terms of paragraph 1 rather than paragraph 2 of Article 6. As the United Kingdom emphasises, there are a number of precedents in which equidistance boundaries between 'opposite' States are prolonged seawards beyond the point where their coasts are geographically 'opposite' each other; and the assumption seems to be that these are prolongations of median lines".[1]

127. The Libyan Counter-Memorial contends that the Court of Arbitration is *eliminating* the distinction between "opposite" or "adjacent" coasts. This is evidently not so. The Court is indicating that the dichotomy presented in Article 6 of the Convention is subject to account being taken of the particular geographical facts of the Atlantic region. Moreover, this reference to the geographical facts is necessary as a part of the "appreciation of the effects of any special geographical features on the equidistance line".[2]

### (e) *The Relation Between the Equidistance Method and the Distinction Between "Opposite" and "Adjacent" States.*

128. A remarkable feature of the reasoning offered by Libya (in developing the thesis that the distinction between "opposite" or "adjacent" States has "disappeared") is the assumption that, if certain geographical situations are not characterised in terms of "opposite" coasts, or are seen to be hybrid in nature, such possibilities exist at the expense of the rôle and significance of the equidistance method. This assumption is completely without foundation. Thus, for example, the Court of Arbitration in the *Anglo-French Arbitration* clearly did not consider that, if the situation in the Atlantic region were to be classified as one of "adjacent" States (under paragraph 1 of Article 6 of the Continental Shelf Convention), this would involve setting aside a solution based upon equidistance.[3] In fact, the Court proceeded to apply the equidistance method, taking account of the presence of the Scilly Islands.[4]

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[1] *Ibid.*, para. 242.

[2] *Ibid.*, para. 241. Also with reference to the Atlantic region the Court had this to say: "Whereas in the case of 'opposite' States a median line will normally effect a broadly equitable delimitation, a lateral equidistance line extending outwards from the coasts of adjacent States for long distances may not infrequently result in an inequitable delimitation by reason of the distorting effect of individual geographical features. In short, it is the combined effect of the side-by-side relationship of the two States and the prolongation of the lateral boundary for great distances to seawards which may be productive of inequity and is the essence of the distinction between 'adjacent' and 'opposite' coasts situations".

[3] *Ibid.*, para. 242.

[4] *Ibid.*, paras. 243–252.

The result was a modification of the equidistance method but the *modus operandi* remained that of equidistance.[1]

129. Both the jurisprudence available and the essential nature of the process of delimitation in accordance with equitable principles confirm the continuing significance of the distinction between opposite and adjacent States. The Libyan views on this question lack any foundation and have a tactical purpose which has no relation to doctrinal discussion. The object of the Libyan thesis attacking the distinction would appear to be to distract attention from the relationship of the real coasts of the Parties, which is clearly opposite and lacks any hybrid elements. In view of the evidence indicating that equidistance is the correct method of delimitation in the case of opposite States, the tactical needs of Libya in the matter are easily understood.

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[1] In the words of the Court of Arbitration (Para. 249):

"The Court notes that in a large proportion of the delimitations known to it, where a particular geographical feature has influenced the course of a continental shelf boundary, the method of delimitation adopted has been some modification or variant of the equidistance principle rather than its total rejection. In the present instance, the problem also arises precisely from the distorting effect of a geographical feature in circumstances in which the line equidistant from the coasts of the two States would otherwise constitute the appropriate boundary. Consequently, it seems to the Court to be in accord not only with the legal rules governing the continental shelf but also with State practice to seek the solution in a method modifying or varying the equidistance method rather than to have recourse to a wholly different criterion of delimitation. The appropriate method, in the opinion of the Court, is to take account of the Scilly Isles as part of the coastline of the United Kingdom but to give them less than their full effect in applying the equidistance method. Just as it is not the function of equity in the delimitation of the continental shelf completely to refashion geography, so it is also not the function of equity to create a situation of complete equity where nature and geography have established an inequity. Equity does not, therefore, call for coasts, the relation of which to the continental shelf is not equal, to be treated as having completely equal effects. What equity calls for is an appropriate abatement of the disproportionate effects of a considerable projection onto the Atlantic continental shelf of a somewhat attenuated portion of the coast of the United Kingdom".

# CHAPTER VIII

# THE RÔLE OF GEOGRAPHICAL CONSIDERATIONS IN ACHIEVING AN EQUITABLE RESULT

## 1. THE MISCONCEPTIONS OF THE LIBYAN COUNTER-MEMORIAL CONCERNING GEOGRAPHICAL CONSIDERATIONS

130. Reference has already been made to the Libyan contention that Malta has neglected the geographical factors relevant to the issue of delimitation in the present case. In the previous chapter the substance of this charge has been rebutted but the question of the apppropriate rôle of geographical considerations has certain facets which call for examination. Such examination is the more justified in the light of the approach to geographical factors to be discovered in the Libyan Counter-Memorial.

131. The approach apparent in the Libyan arguments involves two related elements. In the first place there is a more or less exclusive focus upon "the physical factors of geography, geomorphology and geology".[1] It is true that in a passage of the Libyan Counter-Memorial, appearing near the end of that pleading, it is accepted that "there are other factors which in a given case may also be relevant – or even determinate – in reaching an equitable result"[2] The other factors referred to are the conduct of the parties, security consideration, navigation channels, and historic rights. However, virtually the entire substance of the Libyan Counter-Memorial is devoted in practice to geographical and geomorphological considerations, and this impression is confirmed by a perusal of the Libyan Submissions.[3]

132. This focus upon the "physical factors" is accompanied by a second element, namely, the highly abstract and academic fashion in which these factors are presented. This legally inappropriate approach to the "physical factors" will be analysed in the following paragraphs.

## 2. THE RELATION BETWEEN LEGAL PRINCIPLES AND GEOGRAPHY

133. The fact is that, since the earliest days of the evolution of the law relating to the continental shelf, the elements of geography and geomorphology have appeared not in a pure and abstract form, but

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[1] Libyan Counter-Memorial, pp. 22–23, 139–142, 151–162.

[2] *Ibid.*, pp. 141–142, paras. 6.07–6.08.

[3] *Ibid.*, pp. 171–172.

within a legal framework and within the particular context of delimitation according to law. The very term "continental shelf" can no longer be classified as a physical value: it has become a legal term of art. Similarly, the physical concept of "natural prolongation" has undergone a process of legal refinement. Thus in the *Anglo-French Continental Shelf Arbitration* the Court of Arbitration made the following highly pertinent statement on an important point of principle:

> "The continental shelf of the Channel Islands and of the mainlands of France and of the United Kingdom, in law, appertains to each of them as being the natural prolongation of its land territory under the sea. The physical continuity of the continental shelf of the English Channel means that geographically it may be said to be a natural prolongation of each one of the territories which abut upon it. The question for the Court to decide, however, is what areas of continental shelf are to be considered as *legally* the natural prolongation of the Channel Islands rather than of the mainland of France. In international law, as the United Kingdom emphasised in the pleadings, the concept of the continental shelf is a juridical concept which connotes the natural prolongation under the sea not of a continent or geographical landmass but of the land territory of each State. And the very fact that in international law the continental shelf is a juridical concept means that its scope and the conditions for its application are not determined exclusively by the physical facts of geography but also by legal rules. Moreover, it is clear both from the insertion of the 'special circumstances' provision in Article 6 and from the emphasis on 'equitable principles' in customary law that the force of the cardinal principle of 'natural prolongation of territory' is not absolute, but may be subject to qualification in particular situations".[1]

134. The legal connotation of the concept of natural prolongation was explained clearly and decisively in the Judgment of the Court in the *Tunisia-Libya Continental Shelf* case. The following passages are of particular interest:[2]

> "43. It was the Court itself in its 1969 Judgment which gave currency to the expression 'natural prolongation' as part of the vocabularly of the international law of the sea. It should, however, first be recalled that the geographical and other physical circumstances of that case were different from those of the present case. In particular the whole relevant area of the North Sea consisted of continental shelf at a depth of less than 200 metres. Secondly, it should be borne in mind that, as the Court itself made clear in that Judgment, it was engaged in an analysis of the concepts and

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[1] Decision of 30 June 1977, para. 191.

[2] *I.C.J. Reports*, 1982, pp. 46-47.

> principles which in its view underlay the actual practice of States which is expressive, or creative, of customary rules. The concept of natural prolongation thus was and remains a concept to be examined within the context of customary law and State practice. While the term 'natural prolongation' may have been novel in 1969, the idea to which it gave expression was already a part of existing customary law as the basis of the title of the coastal State. The Court also attributed to that concept a certain role in the delimitation of shelf areas, in cases in which the geographical situation made it appropriate to do so. But while the idea of the natural prolongation of the land territory defined, in general terms, the physical object or location of the rights of the coastal State, it would not necessarily be sufficient, or even appropriate, in itself to determine the precise extent of the rights of one State in relation to those of a neighbouring State.
>
> 44. ... The Court in 1969 did not regard an equitable delimitation and a determination of the limits of 'natural prolongation' as synonymous, since in the operative clause of its Judgment, just quoted, it referred only to the delimitation being effected in such a way as to leave 'as much as possible' to each Party the shelf areas constituting its natural prolongation. The Court also clearly distinguished between a principle which affords the justification for the appurtenance of an area to a State and a rule for determining the extent and limits of such area: 'the appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries' (*I.C.J. Reports, 1969*, p. 32, para. 46). The Court is therefore unable to accept the contention of Libya that 'once the natural prolongation of a State is determined, delimitation becomes a simple matter of complying with the dictates of nature'".

135. From these examples certain conclusions can be drawn. In the first place the intellectual foundations of the Libyan Counter-Memorial are unsound and involve major misconceptions of law. The law concerning continental shelf delimitation does not rest upon "physical factors" in a direct and simplistic way. Secondly, the Libyan reasoning displays a self-serving over-simplification when "geography" and other "physical factors" are applied with notably subjective results. This is especially apparent in relation to the Libyan argument based upon proportionality.

### 3. Physical Factors and Geopolitical Results in the Libyan Case: The Example of Proportionality

136. The reasoning in the Libyan Memorial and Counter-Memorial employs arguments based upon "physical factors" which are not applied within a legal framework. This approach not only involves major departures from legal principle but results in the use of arguments which rest upon a highly subjective notion of "geographical con-

siderations", used as a flag of convenience for claims which cannot be related to the applicable principles and rules of international law.

137. The question of proportionality will be dealt with subsequently in Part V of this Reply and the present reference is confined to the purpose of illustrating the real nature of the Libyan reliance upon "physical factors" in the present case.

138. By way of preface it may be recalled that one-third of the Libyan Submissions[1] relate to the thesis that equitable principles call for the application of a certain concept of proportionality according to which the delimitation should reflect the ratio of "the lengths of the relevant parts" of the coasts of the Parties. In what sense can such an approach to delimitation be said to reflect "physical factors"? Certain it is that this "proportionality" argument refers to coasts, but for the rest it relies upon matters of assumption and policy which have no connection with "physical factors". The introduced factors of a non-geographical character are the following:

(a) the concept of "relevant" coasts;[2]

(b) the assumption that the result will be in accordance with equitable principles;[3]

(c) the assumption that the length of Libya's coasts, or any part of them, should determine the seaward reach of Malta's appurtenant areas of continental shelf.[4]

139. The delimitation contended for by Libya involves an alignment which, in its several versions, would involve a virtual monopoly of the seabed areas lying between Malta and Libya.[5] The Libyan argument rests upon political suppositions which have no normative value in law. The Libyan version of proportionality does not reflect "physical factors" or the geographical situation in the present case. Instead the Libyan claim based on proportionality represents a geopolitical special theory. This theory has two elements. The first is the selection of a *single* physical factor – the length of coasts, or of "relevant coasts" – to the exclusion of other factors, geographical or otherwise. The second is the imposition of a *single* principle – proportionality – in a specialised and inappropriate form – the ratio of coastal lengths. The outcome has nothing in common either with geographical considerations or with equitable principles. The Libyan attachment to the "physical factors" of geography and so forth is hollow and does not reflect legal principle.

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[1] Libyan Counter-Memorial, pp. 171-172.

[2] *Ibid.*, Submissions, para. 7.

[3] *Ibid.*, paras. 5, 6 and 7.

[4] *Ibid.*, paras. 6 and 7.

⑤ [5] See the Libyan Memorial, Map 9; and see Maltese Counter-Memorial, Map No. 4.

# CHAPTER IX

## THE EQUAL STATUS OF ISLAND STATES WITHIN THE FRAMEWORK OF EQUITABLE PRINCIPLES

### 1. Refutation of the Allegation that Malta Argues for a Privileged Status for Island States

140. The Libyan Counter-Memorial claims that Malta has asserted that island States have a privileged status, "a privileged position in continental shelf delimitation".[1] This is a misrepresentation of Malta's position. Moreover, when the Libyan Counter-Memorial defines the "privileged status" in more specific terms, it is seen to be in substance simply a reference to Malta's general case on the principles of delimitation. Indeed, the burden of Libya's complaint appears to be that Malta, as a coastal State, does not accept a legal disability. As the Libyan Counter-Memorial puts the matter:

> "The inescapable conclusion that is derived from the Maltese Memorial is that Malta claims that, as an island State, its continental shelf should extend *as far as the continental shelf of any other coastal state*, irrespective of its small size and its restricted coastline, and that any considerations that might affect the case of dependent islands do not apply to an Island State".[2]

141. The essence of the problem certainly lies in the fact that the significance of coasts, as a matter of legal principle, is in issue between Malta and Libya. This question of principle will be pursued further in Part IV of this Reply, and the relevance of the size – the landmass – of the coastal State has been examined in Part II. For present purposes only certain specific allegations of the Libyan Counter-Memorial will be reviewed.

142. The Libyan Counter-Memorial makes the statement set forth in paragraph 140 above, and then complains that "this allegation does not find support in the jurisprudence referred to by Malta, nor does it accord with the treatment of this issue in the United Nations Sea-bed Committee and at the Third Conference on the Law of the Sea".[3] In

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[1] Libyan Counter-Memorial, pp. 92–98, and see, in particular, p. 98, para. 4.45.

[2] *Ibid.*, p. 92, para. 4.34. Emphasis supplied.

[3] Libyan Counter-Memorial, p. 92, para. 4.34.

one sense this complaint is spurious, since the formulation represents a question which, if Malta's view of the law be correct, *ex hypothesi* could not arise. If island States were not regarded – from the point of view which Malta upholds – as exceptional when the Sea-bed Committee and the Third United Nations Conference were at work, then no reference to the "special case" of island States can be expected. Indeed, the Libyan reasoning from silence points in all directions, if consistency is to be observed. The various debates and records make no reference to "long coast" States or "large" coastal States either: and therefore it follows that these sources cannot be adduced to support Libyan positions.

143. In so far as the debates in the Law of the Sea Conference relate to the entitlement of islands to continental shelf and exclusive economic zone, the outcome confirms Malta's view that island States are not subject to any legal disability in the contexts of entitlement and delimitation. The materials set forth in the Libyan Counter-Memorial[1] which refer to the provenance of Article 121 of the Law of the Sea Convention (on the Régime of Islands) merely confirm the view of the matter to be found in Malta's Memorial.[2]

144. The Libyan Counter-Memorial contends[3] that Malta's view as to the significance of islands in maritime delimitation is not supported by the Decision of the Court in the *Anglo-French Continental Shelf Arbitration*. The reasoning of the relevant passage in the Libyan pleading is quite unpersuasive. Thus it is said that the Court of Arbitration only dealt with certain arguments concerning the status of islands because the Parties in that case presented them. So the Parties did, and in dealing with those arguments the Court of Arbitration took clear positions and expressed views on matters of law. *It did not dismiss the arguments as irrelevant.* Moreover, the political status of the Channel Islands occupied a substantial section of the part of the Decision relating to the "Channel Islands region".[4] The Court expressed its conclusion as follows:

> "It follows that, as between the United Kingdom and the French Republic, the Court must treat the Channel Islands only as islands of the United Kingdom, not as semi-independent States entitled in their own right to their own continental shelf *vis-à-vis* the French Republic".[5]

### 2. Libyan Recognition of the Correct Principle

145. Strange to relate, whilst setting up a false target – the alleged Maltese thesis of a privileged status of island States – the Libyan Counter-Memorial, apparently by way of a concession, produces a

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[1] Pp. 95–97, paras. 4.41–4.43.

[2] Pp. 54–55, paras. 168–169.

[3] Pp. 92–93, para. 4.35.

[4] Decision of 30 June 1977, paras. 183–186.

[5] *Ibid.*, para. 186.

correct statement of the legal position as contended for by Malta. The relevant passage is as follows:

> "It is certainly conceivable that the overall geographical relationship between two States might influence the treatment of their respective islands in delimitation agreements aimed at reaching an equitable result; and that such considerations might not apply in a case where – in consequence of the fact that the island involved is an independent island State – the delimitation would necessarily be restricted to the relationship of that island alone to the opposite continental coast. However, this does not imply a privileged position for such an island because of its independent political status but, rather, results from the effect of the overall geographical relationship between the respective States".[1]

This formulation is very close to Malta's position which maintains the equality of island States and other coastal States within the framework of equitable principles.

### 3. LIBYA'S CLAIM TO PRIVILEGED STATUS

146. Malta's arguments in the present case observe, as they are bound to do, two forms of discipline. First, they are closely related to the legal framework of equitable principles governing continental shelf delimitation. Secondly, they avoid reliance upon a plea of exceptional circumstances: in the words of the Libyan Counter-Memorial, "Malta claims that ... its continental shelf should extend as far as the continental shelf of any other coastal State".[2]

147. In contrast, the Libyan argument in substance lies outside the legal framework, for example, in promoting proportionality to the status of a controlling principle, and calls, quite openly, for a privileged status to be accorded not only to States with long coasts but also to States with "an extensive continental landmass".[3] The Libyan use of proportionality in an eccentric way, together with a version of natural prolongation which does not accord with legal principle, produces a claim to a monopoly of the seabed between Malta and Libya. That is obtaining a privileged status indeed.

148. The true character of the Libyan position as a claim to *privilege* – literally a special advantage, a *lex privata* – can be tested by reference to the practice of States. The large number of delimitation agreements – relating to various regions of the world – constitutes important evidence of the views of States on the question of what is an equitable result in the context of continental shelf delimitation. This evidence is set forth in Malta's Memorial[4] and Counter-Memorial;[5] and the evi-

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[1] Libyan Counter-Memorial, p. 93, para. 4.35.

[2] P. 92, para. 4.34.

[3] Libyan Counter-Memorial, p. 41, para. 2.47; p. 42, para. 2.50.

[4] Pp. 61–96.

[5] Pp. 111–123, 145–146.

dential weight of such material is affirmed in Part VI of the present Reply. The practice of States provides a massive contradiction of the appropriateness and legitimacy of Libya's claim to a privilege both as a "long coast" State and as a State with "an extensive continental landmass".[1]

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[1] See also Annex 4 of this Reply.

# PART IV

# THE LEGAL SIGNIFICANCE OF COASTS IN CONTINENTAL SHELF DELIMITATION

## CHAPTER X

## THE UNDERLYING PRINCIPLES

### 1. The Importance of the Relationship of Coasts to other Geographical Features

149. Both Parties agree that the fundamental rule, which lies behind the equitable principles governing delimitation, is that the appropriateness of any method is a reflection of the geographical and other relevant circumstances of the particular case.[1] Within this conception the coastal configurations of the Parties have a major rôle, and this rôle was emphasised by the Court in its Judgment in the *Tunisia–Libya* case.[2] However, the Libyan argument, as presented in the Counter-Memorial,[3] focuses upon coasts (and lengths of coasts) in a highly abstract way and divorces coasts from the overall geographical circumstances. This produces a serious departure from legal principle. As the Court has made clear in its Judgment of 1982, it is the *relationship* of the coast to the submarine areas adjacent to it, and the *relationship* of the coast to the coasts of opposite or adjacent States, which have to be considered when the process of delimitation is undertaken.[4]

### 2. The Need to Identify the Area of Shelf Relevant to the Decision of the Dispute

150. The Court in the *Tunisia–Libya* case pointed out that the practical aspect of assessing the relationship of the coasts of the Parties was the identification of the area "relevant to the decision of the dispute". This area consists of the areas which can be considered to lie off the coasts of either the one Party or the other. The area "relevant to the decision of the dispute" may be defined in various ways. In the *Anglo–French* case the Court of Arbitration identified the "Atlantic region" in relation to two coastlines abutting on the continental shelf which were "comparatively short".[5] Moreover, the shelf in issue in the Atlantic region "extended to seawards of the coasts of the two countries for great distances".[6]

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[1] Maltese-Memorial, p. 35, para. 110; Libyan Counter-Memorial, p. 22, para. 2.01.

[2] *I.C.J. Reports*, 1982, p. 61, paras. 73–74.

[3] Pp. 32–42, 151–162.

[4] *I.C.J. Reports*, 1982, p. 61, paras. 73–75.

[5] Decision of 30 June 1977, para. 233.

[6] *Ibid.*

151. In both the Memorial and Counter-Memorial Malta has employed a simple figure, which takes the form of a trapezium, to illustrate the concept of *relationship* of the coasts of Malta and Libya. This figure applies to the facts of the present case, *mutatis mutandis*, the approach applied to different sets of circumstances in previous cases. The trapezium is an exercise which seeks to identify the area of shelf "relevant to the decision of the dispute". It involves no novelty whatsoever and the reaction it has engendered in the Libyan Counter-Memorial is surprising.

152. It is the geography which must determine the general dimensions of the area "relevant" to the delimitation. The area identified for this purpose may be extensive, as it was in the *Tunisia–Libya* case, and this can be seen on a map when the distance is taken between Ras Kaboudia and Ras Tajoura. Thus in the present case the trapezium directly reflects the geography and coastal relationships which characterise the dispute.

153. In identifying the areas which may be said to lie *either* off the Maltese *or* Libyan coasts[1] not much difficulty is involved. So far as the Libyan coast is concerned, it seems very arbitrary to take, as Libya does, a certain sector which has an eastern terminus at Ras Zarrouq.[2] The Libyan pleadings take little or no trouble to justify this position in legal terms. In the case of Malta the relevant coasts are those which may be said to face any part of the coast of Libya, whether or not they also face certain other States. It is quite obvious by reference to the task of the Court as defined in the Special Agreement that it is unnecessary to identify with great exactitude the aspects of the coasts of Malta which may be said to face or be opposite to the coasts of Libya. The Libyan concern[3] with coastal detail is irrelevant if not obsessional.

### 3. The Coasts in Relation to the Basis of Entitlement to Submarine Areas

154. In its Judgment in the *Tunisia–Libya* case the Court gave a strong indication of the significance of coasts as the basis of title to shelf rights. The key passage in this respect is as follows[4]:

> "It should first be recalled that exclusive rights over submarine areas belong to the coastal State. The geographic correlation between coast and submerged areas off the coast is the basis of the coastal State's legal title. As the Court explained in the *North Sea Continental Shelf* cases the continental shelf is a legal concept in which 'the principle is applied that the land dominates the sea' (*I.C.J. Reports 1969*, p. 51, para. 96). In the *Aegean Sea Continental Shelf* case the Court emphasised that

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[1] Judgment in the *Tunisia–Libya* case, *I.C.J. Reports*, 1982, p. 61, para. 74.

[2] Libyan Memorial, p. 156, para. 10.09; Libyan Counter-Memorial, p. 39, para. 2.44.

[3] See the Libyan Counter-Memorial, pp. 32–35.

[4] *I.C.J. Reports*, 1982, p. 61, para. 73.

> 'it is solely by virtue of the coastal State's sovereignty over the land that rights of exploration and exploitation in the continental shelf can attach to it, *ipso jure*, under international law. In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State'. (*I.C.J. Reports 1978*, p. 36, para. 86).
>
> As has been explained in connection with the concept of natural prolongation, the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it. Adjacency of the sea-bed to the territory of the coastal State has been the paramount criterion for determining the legal status of the submerged areas, as distinct from their delimitation, without regard to the various elements which have become significant for the extension of these areas in the process of the legal evolution of the rules of international law".

155. As Malta has already had occasion to point out,[1] the nature of the legal basis of title must have a certain bearing on the criteria and methods of delimitation. The highly ambitious Libyan claim to submarine areas within a short distance of the coasts of Malta is incompatible with the principles stated by the Court in the passage above. By no stretch of the imagination can the Libyan claim to a very high proportion of the sea-bed dividing the two States be said to satisfy the "paramount criterion" of adjacency as formulated by the Court.

156. In the Judgment of the Court in 1982 the concept of the continental shelf "as understood in international law" is related to the principles applicable to delimitation,[2] and careful note is taken of the significance of the rôle of distance from the coast as "the legal basis of the title to continental shelf rights".[3] The positions underlying the arguments presented in the Libyan Counter-Memorial[4] continue to be out of line with such contemporary thinking concerning title to shelf rights and its relation to delimitation.

157. The concepts of adjacency and distance reflect the political and security aspects of the interest of the coastal State and the "protective" element in maritime jurisdiction. The distance principle, together with the political and security interests of the coastal State, has the clear implication that there be no major discrepancies in the seaward reach of jurisdiction attributed to coastal States abutting on the same submarine areas.

158. The considerations of principle set forth above receive strong confirmation from the practice of States. This practice gives no support for the view that "mainland" or "long coast" States should receive more than half the sea-bed areas dividing them from opposite "short coast" States. The map of delimitations existing in the Gulf (attached to *Limits*

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[1] Maltese Counter-Memorial, pp. 54-57, paras. 96-102.

[2] *I.C.J. Reports*, 1982, p. 43, para. 36.

[3] *Ibid.*, p. 48, para. 48.

[4] In particular, at pp. 80-87, paras. 4.10-4.24.

*in the Sea* No. 94[1]) is a sample of practice in an area containing important mineral resources. Iran, as the "long coast" State in the Gulf, has been involved in delimitation agreements with no less than five opposite States. The resulting boundaries stand in clear contradiction of the conceptions advanced by Libya in the present proceedings.

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[1] United States Department of State, Office of the Geographer, Bureau of Intelligence and Research, September 11, 1981, reproduced in this Reply as Map No 2 on page opposite.

# CHAPTER XI

# THE SIGNIFICANCE OF LENGTHS OF COASTS

## 1. Libya's Case Rests upon Basic Errors of Principle

159. The Libyan approach to the legal significance of the length of coasts is deeply flawed by conceptual error and as a consequence the Libyan pleadings fail to grapple with the real issues of principle and policy. As always, it is necessary to find the right question to ask, before seeking answers. The right question in the present context would seem to be: What is the legal significance of *coasts*, since the matter of length cannot be considered in a purely abstract form. In the present Chapter Malta will seek to elucidate the significance of coasts, and, in that setting, of coastal lengths, for purposes of shelf delimitation.

## 2. Coasts have a Similar Legal Significance in Terms of Seaward Reach

160. By way of introduction it may be said that, in the exposition which follows, an attempt will be made to avoid a detailed cross-reference to the views expressed in the Libyan Counter-Memorial. The general refutation will necessarily envelop the particular errors and distortions to be found in that pleading. However, a major misrepresentation calls for immediate notice. The Libyan Counter-Memorial states:

> "From this, Malta draws the conclusion that the length of the coastline has *no relevance* to the extent of the continental shelf area appurtenant to that coast and, consequently, *no relevance* for the purpose of delimitation of this area vis-à-vis another State."[1]

No such conclusion is drawn in the passages cited by Libya[2] and no such view is expressed elsewhere in Malta's Memorial. The trapezium figure, and Malta's discussion of coastal relationships in connection with that figure,[3] stand witness to this misrepresentation of Malta's position.

161. The substance of the problem can now be addressed. In the

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[1] P. 84, para. 4.18. Emphasis supplied.

[2] Maltese Memorial, paras. 128–129, 246.

[3] *Ibid.*, pp. 118–122, paras. 240–247.

examination of coastal relationships within a context of legal principle, two assumptions must be made. In the first place, the principle of natural prolongation is a juridical concept to be examined within the context of customary law and the general application of the equitable principles applicable to delimitation.[1] As a "physical factor" natural prolongation has no relevance to the facts of the present dispute, since as has been shown,[2] it is not legally relevant and, in any case, the seabed dividing Malta and Libya is a geological continuum. Secondly, Malta considers reference to "the landmass behind the coastline"[3] to be contrary to legal principle, and Libya's "large State" thesis has already been examined in Part II.[4]

162. The key question of substance clearly is: What is the legal significance of coasts in the context of continental shelf delimitation? Libya sees the question – at least at one level – exclusively in terms of the *lengths* of coastlines.[5] However, in the application of the Libyan arguments the political and geographical reality of coastlines as land territory, bearing a legal and geographic correlation to adjacent submarine areas, is left aside. The Libyan Submissions (2, 3 and 4) based upon natural prolongation which conclude the Counter-Memorial do not refer to coastal configurations in any form, but to the so-called Rift Zone. The Libyan argument based upon proportionality similarly moves well away from the actual coastal relationships. The formula of the ratio of the difference in the lengths of coasts – or "relevant" coasts – simply uses lengths as an arithmetical element in a crude process of apportionment, the result of which bears no relation to coasts as such.

163. The legal significance of coasts must be drawn from the objective political geography of appurtenance and adjacency, since "the geographic correlation between coast and submerged areas off the coast is the basis of the coastal State's legal title".[6] There can be no reference to geography – to coasts as geographical features – in the abstract. The reference is in the legal context of delimitation in accordance with equitable principles; and in consequence the *relation* of the coast to other features is of paramount importance. The relations which are significant are, first of all, the relation *between the coast and the areas of seabed*: in legal thinking this is usually described positively as adjacency, and negatively in terms of the principle of non-encroachment. The second significant relation is that *between the coasts* of "neighbouring States situated either in an adjacent or opposite position".[7]

164. The length of the coasts is naturally an *aspect* of these relations.

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[1] See above, para. 63.

[2] In Part II above.

[3] Libyan Counter-Memorial, p. 84, para. 4.19.

[4] See paras. 72-82 above.

[5] Libyan Counter-Memorial, pp. 38-42, paras. 2.43-2.51, pp. 83-92, paras. 4.17-4.33; pp. 151-162 (Chapter 7).

[6] *I.C.J. Reports*, 1982, p. 61, para. 73.

[7] *Ibid.*, para. 74.

But for present purposes length is not a "piece of string" so many miles long. *In the context of real coasts, length is simply an aspect of the overall relationship between the coasts of neighbouring States and between coasts and the seabed areas relevant to the delimitation.*

165. For purposes of delimitation, it is the relation of coasts to adjacent submerged areas which is of primary interest, and this can only be expressed in terms of a distance principle, that is to say, a presumed *equality of seaward reach of jurisdiction* from the land territory of the respective coastal States. In the practice of international tribunals the logical outcome has been the reference to the overall "geographical and legal framework" of a case for the purpose of determining the "primary boundary", which, subject to the removal of distortions caused by particular features, produces "a generally equitable delimitation as between the Parties".[1]

166. In seeking a primary boundary which gives a "generally equitable delimitation", certain general lines of policy are applicable. In the first place, there is no room for a radical policy of equality of States in the form of a reformation – a refashioning – of geography.[2] The function of the concept of equality is related to the actual geography of the region. Within that actual geographical framework, the delimitation process involves seeking an approximate *equality of relationship* between the respective coasts and the areas of continental shelf dividing the coasts.[3]

167. This "approximate equality"[4] or "balance of geographical circumstances"[5] has no connection with proportionality as a distinct factor, and is merely a reflection of the broad geographical framework. In the *Anglo-French Continental Shelf Arbitration* this balance took different forms. In the case of the English Channel, leaving aside the Channel Islands region, the balance resulted from the relationship of opposite coasts,[6] the unity and continuity of the region,[7] and the equality of the coastlines in relation to the continental shelf.[8] In the case of the Atlantic region, the Court found sufficient elements of balance in the lateral relation of the two attenuated maritime frontages in spite of the existence of certain differences.[9]

168. There is no indication that the Court of Arbitration considered that the equality of lengths of coastlines was a necessary condition in all cases for the existence of "a balance of geographical circumstances".

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[1] *Anglo-French Arbitration*, Decision of 30 June 1977, paras. 101–113. See further *ibid.*, paras. 181–183, 196, 199–201.

[2] *Ibid.*, paras. 101; 195.

[3] *Ibid.*, para. 181–182, 196.

[4] *Ibid.*, para. 181.

[5] *Ibid.*, para. 183.

[6] *Ibid.*, paras. 103, 181–182.

[7] *Ibid.*, para. 181.

[8] *Ibid.*, paras. 182–183, 196, 201.

[9] *Ibid.*, paras. 232–248.

and there is no justification for the inference to this effect in the Libyan Counter-Memorial.[1]

169. It is clear that the balance of geographical circumstances which produces a median line as a "generally equitable" delimitation will often consist of situations in which the opposite States have coasts which are not equal in length. In the *Anglo–French Arbitration* the abutting coasts which were the basis of delimitation in the Atlantic region were both relatively limited in extent. Moreover, their actual extent was far from equal relative to each other – the Cornish Peninsula is very attenuated, and the Scilly Islands even more so[2]: yet the primary delimitation between the English and French coasts was still an equidistance line. Furthermore, it is recorded in the Decision that as between the Channel Islands and the French coast the Parties had agreed upon a median line as the boundary.[3]

170. In the present case, the balance of geographical circumstances must lead to the equality of seaward reach of the opposite coasts of the Parties. In the Libyan argument this equality of seaward reach is rejected absolutely.

### 3. The Link between Attribution of Shelf Areas and Delimitation

171. The Libyan claims in the present case, whether based upon natural prolongation or the ratio of the difference between coastal lengths, would produce a result which would reduce Malta's appurtenant shelf area to a very modest enclave.[4] It is illuminating to consider the link between the rules of entitlement and the policy of delimitation as between opposite or adjacent States: *and in making such an inquiry the extreme form of the Libyan claims is to be borne in mind.*

172. If an island State exists in mid-ocean or in any other situation which does not involve issues of delimitation of shelf areas with neighbouring States, the question of appurtenance or entitlement is obviously regulated by reference to the principles to be found in the Law of the Sea Convention. In consequence, the coastal State would have exclusive rights over submarine areas stretching not less than 200 miles, in accordance with the distance principle.

173. In the case of an island State which abuts upon the same continental shelf as a "long coast" State, the normal outcome, well evidenced by State practice, is a median line. The median line may be modified to avoid distortions caused by local irregularities but there is, as a matter of principle, no weighting in favour of the "long coast" State. This is the outcome when the island State presents a long coast to the mainland State, as in the case of the United Kingdom and France. It is equally the outcome when the island State does not have a

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[1] P. 89, para. 4.28; pp. 153–155, paras. 7.10–7.12.

[2] See Map No 3 on page 88.

[3] Decision of 30 June 1977, para. 22.

[4] See Map 9 of the Libyan Memorial.

long coast, as in the case of Bahrain and Saudi Arabia.[1] The same result also appears in delimitations between "long coast" States and peninsula States, as in the case of Qatar–Iran[2] and Oman–Iran.[3]

174. In the case of an island State (or a peninsula State) abutting on the same continental shelf as a "long coast" State, there is no reason why the normal solution should be excluded when the seabed dividing the two opposite States is extensive – of the order of 100 miles (Bahrain–Iran),[4] or 180 miles (Malta–Libya) or 400 miles (India–Maldives).[5] There is no evidence from the practice of States and no consideration of principle which would suggest that the "long coast" State in such delimitations should be given a boundary line weighted in its favour.

175. The fact is that the question of entitlement and the issue of delimitation are connected, and this is logical as the business of delimitation is related to the legal basis of title. An island State near a long coast State in a semi-enclosed sea area, such as the Gulf, is not placed under a legal disability as a consequence.

176. In conclusion it is to be recalled that, when islands are to some extent discounted for delimitation purposes, such discounting is not based on consideration of the length of coasts. The principal reasons for discounting islands recognised in the jurisprudence are two:

(a) that they are wholly detached from the mainland of the State of which they form part and thus lie on the wrong side of the primary boundary indicated by the geographical framework;[6]

(b) that the islands, though geographically constituting an extension of the mainland of the State of which they are part, have a location which deflects the primary boundary further than would the baseline of the mainland.[7]

177. It is noteworthy that *even in the case of dependent islands located close to the mainland of another State*, the delimitation which results does not involve the kind of discounting for which Libya argues. The delimitation agreed in principle between France and the Channel Islands is a median line.[8] Similarly, delimitations between Norway and the United Kingdom (Shetland Islands), India and Indonesia, India (Nicobar Islands) and Thailand, and Australia and France (New Caledonia), did not reduce the weighting given to groups of dependent islands.[9]

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[1] Libyan Counter-Memorial, Annex of Delimitation Agreements, Annex 5.

[2] *Ibid.*, Annex 21.

[3] *Ibid.*, Annex 40.

[4] Maltese Memorial, Reduced Map 2 at p. 63. See also Map 1 of this Reply.

[5] *Ibid.*, p. 65.

[6] *Anglo-French Arbitration*, Decision of 30 June 1977, paras. 192, 196–201.

[7] *Ibid.*, paras. 243–254. See also the Judgment in the *Tunisia–Libya* case, *I.C.J. Reports*, 1982, p. 63, para. 79; pp. 88–89, paras. 126–129; p. 91, para. 131.

[8] *Anglo-French Arbitration*, Decision, para. 22.

[9] Maltese Memorial, Annexes 50, 51, 53 and 54 and relative Reduced Maps at pp. 81, 82, 85 and 87 respectively.

### 4. THE SCALE OF EQUITABLE ADJUSTMENT

178. The considerable weight of experience in matters of delimitation, both in terms of jurisprudence and the practice of States, indicates that in principle all coasts count more or less equally in terms of seaward extension of jurisdiction. This is true of the *North Sea* cases, the *Anglo-French Continental Shelf Arbitration* and the *Tunisia–Libya* case. Such an assessment is not necessarily related to a particular method of delimitation. It reflects the essence of continental shelf law: the coasts of the State generate rights over submarine areas and, at least as a presumption, this process has a more or less uniform effect. The political and security aspects of coastlines are not of variable significance in legal terms.

179. It follows from these premises that the primary boundary selected in accordance with equitable principles always aims, however approximately, at an equal attribution of shelf areas to coastal States. It follows also that any modification or adjustment of the primary boundary on account of local irregularaties would be limited in scale and would not be radical in result. The process of adjustment can only apply on the margins of the basically equal relationship of the coastal States. The scale of the modification of the primary boundary as determined by the major geographical features is always limited, and this is evidenced by the existing jurisprudence.

180. The Libyan position as expounded both in the Memorial and the Counter-Memorial thus suffers from an all-pervading weakness, since the Libyan claims totally ignore the concept of equal entitlement in terms of seaward reach. Both the Libyan theses – the one based upon physical natural prolongation, the other based upon the ratio of the lengths of coastlines – call for a delimitation marked by radical inequality and an arbitrary notion of apportionment.

### 5. THE RATIO OF COASTAL LENGTHS: PROPORTIONALITY ADVANCED AS AN INDEPENDENT SOURCE OF RIGHTS

181. As Malta has already had occasion to point out,[1] the Libyan pleadings employ proportionality as a primary source of title and as an independent source of rights. This application is contrary to legal principle and, if it were to be given any currency, it would transform the legal and political significance of coastal geography. The settlement of disputes concerning maritime delimitation normally involves negotiation. On the Libyan view of the law, the variables in any negotiation would be so greatly increased that the settlement of disputes by negotiation would be made much more difficult to achieve.

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[1] Maltese Counter-Memorial, p. 153, para. 321.

## 6. The Significance of the Distinction between Opposite and Adjacent States

182. In the light of the considerations set forth above, it is now possible to appreciate the real significance of the distinction between opposite and adjacent States. The distinction is not always applicable in a neat way and some geographical situations may be more or less mixed. None the less the distinction forms an important aspect of any practical exercise in seeking an equitable result; and this is true whether or not the equidistance method of delimitation is in issue.

183. The distinction between opposite and adjacent States forms a part of the procedure by which a tribunal discovers a basis of "approximate equality"[1] and a "balance of geographical circumstances."[2] Such a balance does not involve distributive justice but should reflect the *relationships* of the principal sectors of abutting coasts. It is not concerned with spatial distribution according to a dogmatic formula such as the ratio of the lengths of coastlines.

184. The "balance of geographical circumstances" should satisfy three conditions set by the legal framework:

(*a*) As a principle of appurtenance, or entitlement, all mainlands are to be given full effect in terms of a presumed equality of seaward reach of sovereign rights from the land territory over adjacent submarine areas.

(*b*) In the process of delimitation, actually abutting coasts of mainlands are to be given full effect.

(*c*) The principle of non-encroachment is to be observed.

185. The normal case of opposite-related abutting coasts will produce a balance of geographical circumstances based upon the concept of equidistance: since a median line is the equitable result of this balance in appropriate circumstances and not an independent or "obligatory" rule. In the case of "adjacent" States the maintenance of a geographical balance cannot depend on the unqualified use of an equidistance line, precisely because the principle of non-encroachment and the concept of equality of seaward reach of rights over adjacent submarine areas would be placed in jeopardy. This is, of course, familiar to the Court, but it provides a useful preface to observations on the Libyan reasoning in this case. The Libyan position is that Malta's reliance upon equidistance is dogmatic and that Malta ignores actual coastal geography.[3] This is the reverse of the truth. Malta relies upon the relationships of *real coasts* – not abstract calculations based on ratios of lengths – and on the balance of actual geographical circumstances.

186. The principle of balance and the principle of non-encroachment call for different techniques of adjustment in different geographical

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[1] *Anglo-French Arbitration*, para. 181.

[2] *Ibid.*, para. 183.

[3] Libyan Counter-Memorial, Chapter 7.

situations. In the case of opposite States some modification of the primary equitable delimitation may be necessitated by the presence of islets or coastal irregularities. In the case of adjacent States similar modification, *mutatis mutandis*, may be called for. *But in both situations it is the approximate equality of seaward reach of sovereign rights which is being maintained.*

187. In consequence, even when the technique of modification in the case of adjacent States involves some form of proportionality calculation, this exercise still rests upon the basic premises of non-encroachment and equality of seaward extension; indeed, these values are the very *raison d'être* of the modification. Moreover, because what is involved is *modification in order to maintain a balance of geographical circumstances and an "approximate equality"*, the result cannot constitute an apportionment which attributes little or no seaward extension of sovereign rights to the land territory of one of the Parties. In the present case Libya insists (wrongly in principle) that a certain form of proportionality should be applied in a case of opposite States. Not only that, but Libya also insists on an extreme form of proportionality claim which falls outside the criteria of modification *even if the present case were one of adjacent coasts.*

188. The result of the *Tunisia–Libya* case is in full accord with the view of the matter set forth above. The Judgment (and especially Part B of the *Dispositif*)[1] makes clear that the delimitation envisaged was to reflect "the general configuration of the coasts of the Parties". This basic principle dominated the approach in both sectors of the delimitation carried out by the Court. In spite of the strong elements of adjacency in the coastal relationships, the Court indicated a delimitation which allowed a *generally equal* seaward extension to both coasts, and it may be noted that this giving of full faith and credit to coastal geography was not in fact related to the application of the equidistance method.

189. In the circumstances of laterally related coasts of adjacent States, where the coasts have a point of departure at the terminus of a land boundary, the reference to the lengths of coastal fronts as part of the application of the factor of proportionality[2] is necessary *precisely in order to produce a balance in the seaward extension of rights over submarine areas.* However, the application of such a method to opposite coasts has the effect, not of producing an approximate equality but of causing a severe imbalance: and this is because in a simple case of opposite coasts the length of the respective coastlines cannot play a rôle in avoiding convergence and undue encroachment. Allowing for the difference in geographical circumstances, the use of a calculation based on the ratio of lengths of coastlines produces a qualitatively different and totally inequitable result in the present case, whereas in the *Tunisia–Libya* case the delimitation adduced by the Court was very sen-

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[1] *I.C.J. Reports*, 1982, p. 93.

[2] *Ibid.*, p. 91, para. 131.

sitive to the question of non-encroachment and was thus concerned not to give "excessive weight" to the Kerkennahs.[1]

### 7. Delimitation Must Relate to the Coasts Actually Abutting on the Continental Shelf

190. The basis of title – as the Libyan Counter-Memorial recognises[2] – is "the geographic correlation between coast and submerged areas off the coast". This relationship reflects both the principle of distance and the concept of adjacency. Unless there are special circumstances justifying some technique of abatement, the normal legal implication of a coast is an equality of seaward reach, both as between different sectors of the same coast and as between the coasts of opposite and adjacent States abutting upon the same continental shelf.

191. Unless geography – the actual coasts abutting on the shelf areas dividing the Parties – is to be ignored, delimitation involves the use of appropriate basepoints. The use of basepoints is the simple procedure by which the generation of shelf rights is reflected by use of normal survey and hydrographic techniques. When a method of delimitation other than equidistance is to be used, other techniques with a similar objective may be employed, including the construction of coastal fronts. The use of such techniques always involves the reflection of geographical facts for legal purposes, a very familiar aspect of the law of the sea.

192. As a matter of logic and on the basis of the jurisprudence, it is necessary to determine (a) which are the actually abutting coasts in a given case; and (b) which count as *mainland* coasts. The rôles of the Cornish peninsula and the Isles of Scilly in the *Anglo-French Continental Shelf Arbitration* are of relevance in this context. Cornwall and the Scilly Isles were coasts "actually abutting on the continental shelf" of the region,[3] and the latter counted as an extension of the landmass – the mainland – of the United Kingdom.[4]

193. Malta is an island State with a political status equal to that of other coastal States and is therefore in legal terms a mainland. Its coasts in their southerly aspects, abut upon the shelf areas which divide the Parties. By reason of their shape and location – which are not unusual as a matter of the law of delimitation – the Maltese group generates a normal seaward reach or radial projection of sovereign rights over adjacent submarine areas. Since it is coasts "in place", so to speak, and not abstract *lengths* of coasts, which generate such rights, it is clear that, even if Malta had a much longer coast, this would have little or no effect on the general outcome so far as generation of shelf ⑯ rights is concerned. This is shown very well by Diagram A contained in the Libyan Counter-Memorial.[5]

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[1] *Ibid*, pp. 88–89, para. 128; and see the Dispositif, p. 93, B(2) and (3).

[2] P. 157, para. 7.18.

[3] Decision, para. 248.

[4] *Ibid.*, paras. 248–251. See also Map No. 3 at page 88.

[5] Opposite p. 160 and reproduced in this Reply at page 94.

⑱ 194. The Libyan Counter-Memorial[1] considers that its Diagram A proves that equidistance has a "distorting effect". In fact the diagram simply shows the way geography works, unless it is to be refashioned. It is geography, coasts in relation to other features, including location and distance, and not length of coasts *as such*, which is decisive. The significance of coasts and coastal lengths must be measured relative to something else; and in the case of opposite coasts length as the factor of measurement is less significant than it is in other geographical circumstances.

195. These considerations can be weighed at the level of practical experience by a perusal of boundaries in the Gulf as indicated in *Limits in the Seas*.[2] The delimitations involving Bahrain – Saudi Arabia, Bahrain – Iran, Qatar – Iran, and Oman – Iran, all contradict the Libyan view on lengths of coasts. Indeed, the whole pattern of maritime boundaries illustrates the equality of seaward extension of jurisdiction which is the legal reflection of real coasts. This type of equality falls within the tradition of territorial sea and other maritime extensions as zones of uniform breadth appurtenant to the coasts of States. In the Gulf the position of Bahrain illustrates the equality of seaward reach which accords with the framework of the law and equity in continental shelf delimitation. The areas appurtenant to Bahrain as it faces Iran are not of the same extent as those appurtenant to Bahrain as it faces Saudi Arabia: ***but within the opposite relationships Iran–Bahrain and Saudi Arabia–Bahrain there is a marked equality of seaward reach.***

## 8. COASTAL RELATIONSHIPS AND DELIMITATION IN SEMI-ENCLOSED SEAS THE RESULTS OF THE LIBYAN APPROACH

196. The drawbacks to the Libyan position on the significance of coastal lengths can be illustrated by a hypothetical situation as in ㉛ Figure A.[3] A number of short coast States abut upon the same shelf as a long coast State. According to Libyan reasoning, the length of the coast of State I would operate *in each case* against States II*n* opposite State I, and the result would be a "proportionality" line of obvious inequity. Libyan logic about the length of coasts as such – the "piece of string" approach – does not allow for common sense, and contains no qualifications.

197. If it be accepted that in the situation shown in Figure A the equitable solution, reflecting the balance of geographical circumstances, is a delimitation based upon a median line, can it be said that a *single* ㉛ short coast State II (as in Figure B)[4] opposite State I should accept less than equidistance? First of all, it may be asked what does State I "lose"

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[1] Pp. 160–161, paras. 7.24–7.26.

[2] United States Department of State, Office of the Geographer, Bureau of Intelligence and Research, *Limits in the Seas*, No. 94, "Continental Shelf Boundaries: The Persian Gulf"; also reproduced in this Reply as Map No 2 at page 82.

[3] At p. 96.

[4] *Ibid.*

by the change of circumstances? The answer must be little or nothing. As a consequence of the equidistance method (as illustrated by ⑯ Diagram A in the Libyan Counter-Memorial) State I "keeps" all the sector below the median line. State II "gains" the shaded areas above the median line *but not at the expense of State I*. The balance of geographical circumstances has not changed sufficiently to depart from the median line as the equitable solution.

198. This exercise provides the "length of coastlines" argument with a decent burial and relates the issue of delimitation to the political realities of coastal State relationships in semi-enclosed seas. The existing patterns of boundary settlement in the Baltic Sea and the Gulf are ㉛ related to Figure B and not to the Libyan approach the result of which is depicted in Figure A.

## 9. Significance of Lengths of Coasts: Summary

199. The Libyan contentions in the present case present a major paradox. This consists in the fact that the superficial insistence upon the importance of lengths of coasts is accompanied by Submissions and arguments claiming large areas of seabed adjacent to Malta on the basis of legal theses – physical natural prolongation and the proportionality doctrine based upon a formula (the ratio of lengths of coasts) – which have no connection with the actual coasts of Malta and Libya.

200. The Libyan version of the significance of coastal lengths is substantially inconsistent with the following important principles:

(a) The relation of coasts to other features is of paramount importance, and especially the relation to adjacent areas of seabed and the relation between the coasts of opposite or adjacent neighbouring States.

(b) The distance principle, and adjacency of seabed to the territory of the coastal State as the basis of legal title to shelf areas, indicate a presumed equality of seaward extension of jurisdiction.

(c) Coasts form part of the broad framework within which a Court must seek a balance of geographical circumstances, but equality of the lengths of coastlines is not a necessary condition for the existence of a "balance of geographical circumstances".

(d) The rules of entitlement to continental shelf areas of islands and island States are logically connected with the principles of delimitation as between neighbouring States: and whether an island State is located in mid-Ocean, or is placed in a semi-enclosed sea with opposite or adjacent States abutting on the same shelf area, there is no evidence of a legal disability in the context of delimitation as against 'long coast' States.

(e) Even when islands (not island States) are to be discounted to some degree, such discounting is not based on consideration of the length of coasts.

(f) The distinction between opposite and adjacent coasts forms a part of the discovery of a "balance of geographical circumstances" as a part of the process of delimitation; and in the normal case of opposite coasts a median line is the equitable result of this balance.

(g) The principle of non-encroachment which may call for modification of the primary equitable delimitation is compatible with the approximate equality of seaward extension of sovereign rights which is in effect being maintained by means of such modification: the *raison d'être* of the modification is to avoid tendencies to enclaving and encroachment.

(h) The Libyan invocation of proportionality on the basis of the ratio of the lengths of coasts in the wrong geographical context produces the very type of encroachment and geographical imbalance which equitable principles are designed to avoid.

(i) The Libyan claims are unrelated to existing patterns of the practice of States and ignore the political realities of coastal relationships in semi-enclosed seas such as the Baltic, the Mediterranean and the Gulf.

(j) The geographical circumstances which produce the framework within which delimitation takes place consist of the arrangement of real coasts. The location and shape of such coasts, as they actually abut upon the areas of shelf in dispute, are significant in generating shelf rights, and "length" of coasts is only relevant *in so far as it is only one element in the number of elements which constitute the configuration of the Parties' coasts*. As a consequence, even if Malta had a larger extent and a longer coastline, the result in terms of seaward extension of jurisdiction over the shelf areas in dispute would remain unaffected.

# PART V

# THE RÔLE OF PROPORTIONALITY: LIBYAN MISREPRESENTATIONS CORRECTED

## CHAPTER XII

## LIBYA'S MISREPRESENTATION OF MALTA'S POSITION CONCERNING THE RÔLE OF PROPORTIONALITY

201. The treatment of the issue of proportionality in the Libyan Counter-Memorial is characterised by persistent failure accurately to represent Malta's position concerning the rôle of proportionality. Thus the assertion is made that "the rejection of proportionality is crucial to the Maltese case",[1] and it is suggested that Malta has attempted "to discredit" proportionality.[2] These statements are incorrect and Malta's views on the subject are given clear expression in its Counter-Memorial.[3] The Maltese view is that proportionality *in the particular mode of the use of the ratio of the lengths of coastlines* is inapplicable in the circumstances of the present case. On the other hand, proportionality remains as a criterion for evaluating the equities of certain geographical situations. Certainly it has no *a priori* rôle in delimitation cases and the nature of its rôle must depend on the circumstances of each case.[4]

202. A further stage of Libyan misrepresentation of Malta's views takes the form of assertions that Malta's use of a trapezium figure as a method of expounding the relationships of the coasts of the Parties is "another form of proportionality test".[5] Such assertions have no basis. It is certainly true that the trapezium figure may assist in assessing the equitable nature of a delimitation based upon equidistance but it cannot be said that any means of assessing the appropriateness of a method of delimitation is *ex hypothesi* a form of "proportionality test".

203. In Malta's Counter-Memorial[6] the trapezium figure is used again to show that the median line satisfies the general test of equity in the present case. After all is said and done the figure is a simple representation of coastal relationships and the function of distance. It shows how the effect of the equidistance method is always to reflect the *equal* seaward reach of jurisdiction from the coasts of the two opposite States, whatever the distance between them.

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[1] Libyan Counter-Memorial, p. 142, para. 6.10.

[2] *Ibid.*, pp. 142–146, *passim*.

[3] Part III, Chapter IV, pp. 98–123.

[4] *Ibid.*, pp. 105–107, paras. 237–242.

[5] Libyan Counter-Memorial, pp. 149–150, paras. 6.33–6.37; pp. 162–164, paras. 7.33–7.39.

[6] Pp. 107–108, paras. 244–245 (and Figure 5 at p. 109).

204. Yet another misrepresentation of Malta's views occurs in the Libyan Counter-Memorial, when it is suggested that Malta considers that coastal length is irrelevant *tout court*.[1] This suggestion is very surprising, since the trapezium figure shows exactly how the equidistance line relates both to seaward or distance relationships and to the west to east extension of coasts.

205. In general the Libyan Counter-Memorial makes very heavy weather of the trapezium. Essentially the figure shows geographical relationships. Its sides consist of lines drawn so as to encompass those submarine areas *lying off one or other of the coasts of two opposite States*, one with a short and one with a long coast. An equidistance line is included and the result of this simple demonstration was given a name for reference purposes. The trapezium reflects geographical realities in the most straightforward fashion.

206. In seeking to attack the trapezium figure, the Libyan Counter-Memorial adopts a variety of tactics which are based upon irrelevance and illogicality. These tactics are examplified by the assertion that, within the trapezium, Malta's share of the shelf is "determined by the length of the Libyan coast, not Malta's own coast".[2] This is, of course, nonsensical. The length of the median line is governed by the lengths of *both* coasts and also by the distance between them. The diagram ㉑ (Figure 5) provided in the Maltese Counter-Memorial[3] illustrates the interaction of the various factors. Indeed, the proposition that Malta's share is determined by one coast – the Libyan – is contradicted elsewhere in the Libyan Counter-Memorial,[4] where it is stated that ."under most normal circumstances the length of any median line is directly dependent on the length of the two coasts controlling it".

207. Another Libyan criticism of the trapezium is that "the exercise has nothing to do with the actual coastlines of the Parties".[5] This assertion is not logically compelling, for the trapezium is based, in two of its three critical elements, precisely upon the coasts of the opposite States. It simply will not do to say that the short coast of Malta is "largely irrelevant to the exercise".[6] Nor is there justification for the complaint that "as to the long, Libyan coast, no explanation is offered by Malta to show why this enormous length of coast is relevant to this delimitation".[7] There is a certain difficulty in explaining what may seem obvious. The coasts included were those which were in legal and geographical terms "opposite". In the language of the Judgment of the Court in the *Tunisia–Libya* case "the area in dispute, where one claim

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[1] Libyan Counter-Memorial, pp. 142–143, paras. 6.10–6.15.

[2] *Ibid.*, p. 163, para. 7.37; and see also para. 7.38.

[3] At p. 109.

[4] Libyan Counter-Memorial, p. 143, para. 6.15.

[5] *Ibid.*, p. 163, para. 7.39.

[6] *Ibid.*

[7] *Ibid.*, (at p. 164).

encroaches on the other, is that part of this whole area which can be considered as lying both off the Libyan coast and off the Tunisian coast".[1] There is no mystery to be explained in this respect.

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[1] *I.C.J. Reports*, 1982, p. 61, para. 74. See also the *Anglo-French Arbitration*, Decision of 30 June 1977, para. 100.

# CHAPTER XIII

# THE LEGAL FRAMEWORK

## 1. A Libyan Position Based on Fundamental Error

208. The Libyan use of the factor of proportionality as disclosed in the Counter-Memorial continues to be deeply flawed and incompatible with legal principle. Libya relies upon a particular version of proportionality as the dogmatic basis for what is in effect a delimitation. This delimitation stems directly from proportionality and thus, contrary to legal principle, this factor is invoked to provide an independent source of rights to areas of continental shelf, rather than "as a criterion or factor relevant in evaluating the equities of certain geographical situations".[1]

209. In the second place the Libyan use of proportionality disregards that part of the legal framework of delimitation which consists of the principles which determine the basis of the entitlement of the coastal State to adjacent submarine areas. The Libyan claim to submarine areas as close as fifteen miles to the coasts of Malta contradicts the legal basis of title to continental shelf as explained in the jurisprudence of the Court.[2]

## 2. The Length of Coasts Treated as an Abstraction

210. The focus upon the *length* of coasts as an abstract value or factor in the Libyan argument is deeply flawed by conceptual error. In Part IV, Chapter XI of this Reply, Malta has examined the significance of lengths of coasts in a careful perspective of law and policy. In Libyan methodology the issue of coastal relationships – in other words, the geographical circumstances of the case – is reduced to the question of lengths of coasts, and the issue of what is an equitable result is reduced to a single operation involving a certain type of proportionality test. In this way the question of what is equitable is transposed to the formula based on the differences of lengths of coasts. The real geographical framework of the case is disregarded, and the factor of proportionality is not properly related to, but takes precedence over, the application of the ensemble of equitable principles and relevant circumstances.

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[1] *Anglo-French Arbitration*, Decision of 30 June 1977, para. 101.

[2] See para. 154–158 above.

### 3. PROPORTIONALITY IN THE LIBYAN MODE CAUSES INEQUITY

211. In Part IV of the Reply, Malta has already had occasion to point out that the principal basis for seeking an equitable solution is the actual geographical framework and, within this framework, the "balance of geographical circumstances".[1] This balance has no connection with proportionality as an independent factor, but is a reflection of the geographical framework. The idea behind the concept of balance is an approximate equality and not an exercise in geopolitical "distributive justice". What is aimed at is the avoidance of a monopoly or a preponderance in relation to the area in dispute as causes of inequity. At the same time, States are presumed to have a dominant interest in *adjacent* submarine areas and an equality of seaward reach of jurisdiction.

212. In the circumstances of the present case the Libyan claim would establish a very marked preponderance in favour of one State in submarine areas adjacent to the coasts of the other State. The Libyan approach involves the use of a proportionality argument not in order to avoid but in order to produce preponderance and inequity. The absurd result, which is out of line with the practice of States in comparable situations in the Gulf and elsewhere, is a consequence in part of using a proportionality principle as an independent source of rights and in part of using a form of "proportionality test" which is inappropriate to the case of opposite coasts.

### 4. THE IMPORTANCE OF THE RELATIONSHIP OF COASTS

213. In the evaluation of the balance of geographical circumstances, the length of the respective coasts is but one of the various geographical circumstances relevant to the delimitation and it is the *relationship* of coasts which is all-important. There is no evidence to support the view that as a matter of principle an island State opposite a long coast State in a semi-enclosed sea is placed under a legal disability in the context of delimitation of shelf areas: and there is no evidence that the existence of such a disability is contingent upon the presence or absence of an equality of length of coastlines. These issues have been examined more fully in Part IV, Chapter XI of this Reply, where, *inter alia*, it is shown that the Libyan position is strongly rebutted by the practice of States.

### 5. THE LIBYAN VERSION OF PROPORTIONALITY IS INAPPLICABLE EVEN IN CASES OF ADJACENT COASTS

214. The essence of the Libyan argument as presented in the Counter-Memorial consists of the following elements: —

(a) The test of proportionality appropriate in all cases is based upon the ratio of the difference between coastal lengths.

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[1] See paras. 167–170 above.

(b) There is no difference between "opposite" and "adjacent" States in this connection.[1]

(c) Consequently, even if the "opposite" relationship of coasts in the present case is to be accepted, the "ratio of coastal lengths" approach is applicable as between Malta and Libya.

(d) Proportionality is a direct source of rights and a direct method of delimitation, and not merely a corrective to be applied after other conditions are fulfilled.

215. The unsoundness of these positions has been demonstrated already in this Reply and the present purpose is to point out that, even in situations of "adjacent" coasts, the test of proportionality is not applicable *in the form which Libya has adopted in the present case.* The following examples of cases of "adjacency" are fairly representative of the type of problem which occurs in practice.

㉜ (i) *Adjacent States on a Regular Coast* (Diagram A)

216. The balance of geographical circumstances in such a case is obvious and the equitable result must consist either of an equidistance line or of a perpendicular. There is no room for referring to the ratio of lengths of coasts.

㉜ (ii) *Converging Coasts in a Gulf With a Land Boundary Terminus at the Apex* (Diagram B)

217. The permutation of geographical circumstances presented in this context is best described as involving adjacent coasts within the vicinity of the terminus of the land boundary which become predominantly opposite away from the apex of the gulf. There can be no question about the appropriateness of equidistance in such circumstances as the normal basis for a delimitation which reflects the balance of geographical circumstances. The practice of States establishes the recognition of equidistance as the equitable result in such cases.[2] There is no basis for invoking a "proportionality" test based upon the ratio of lengths of coasts.

㉝ (iii) *Laterally Related Coasts Abutting on a Shelf Extending Seawards from the Coasts* (Diagram C)

218. In the *Anglo-French Continental Shelf Arbitration* the Court of Arbitration took some care in examining the relationship of the coasts of the United Kingdom and France in the Atlantic region.[3] Whilst the Court stressed that the fixing of the "precise legal classification of the

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[1] See, in particular, the Libyan Counter-Memorial, pp. 144-145, paras. 6.17-6.24.

[2] See the following examples: Argentina-Uruguay, *Limits in the Seas*, No. 64; Finland-Sweden, *ibid.*, Nos. 16 and 56.

[3] Decision of 30 June 1977, paras. 233, 241-242.

Atlantic region" appeared to be "of little importance", emphasis was placed upon the particular characteristics of the relationship. Thus the Court accepted that "beyond the point where the coasts are geographically opposite each other, the legal situation changes to one analogous to that of adjacent States". In its conclusion on the question the Court observed:

> "What is important is that, in appreciating the appropriateness of the equidistance method as a means of effecting a 'just' or 'equitable' delimitation in the Atlantic region, the Court must have regard both to the lateral relation of the two coasts as they abut upon the continental shelf of the region and to the great extent seawards that this shelf extends from those coasts".[1]

219. In the Atlantic region the Court applied the equidistance method as the basis of an equitable solution which reflected the balance of the geographical features of the region. The question of the effect to be given to Ushant and the Scilly Isles was seen in terms of the *modification* of the equidistance method rather than its "total rejection".[2] The framework of the process of delimitation was thus the equidistant line between the laterally related coasts. The Court stated the issue within this framework:

> "The problem therefore is, without disregarding Ushant and the Scillies, to find a method of remedying in an appropriate measure the distorting effect on the course of the boundary of the more westerly position of the Scillies and the disproportion which it produces in the areas of continental shelf accruing to the French Republic and the United Kingdom".[3]

220. What is striking about the Court's whole approach to the issue of "distortion" is that the object of the exercise was *to maintain the appropriate seaward extension of both the United Kingdom and French coasts.* The problem had *no relation to the lengths of coasts.* Thus, when the Court adverts to "the element of 'proportionality'",[4] this was considered within the context of the abatement of the "distorting effects" of the Scillies *on the equidistance line.*[5] The equidistance line represented equity as between the mainlands of France and the United Kingdom: and therefore the issue of distortion was one of maintaining the normal seaward reach of the mainlands as far as possible. The issue of "distortion" was equated to the element of proportionality.[6]

221. In describing the rôle of equity the Court of Arbitration observed:

> "The appropriate method, in the opinion of the Court, is to take

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[1] *Ibid.*, para. 242.

[2] *Ibid.*, para. 249; and see also para. 251.

[3] *Ibid.*, para. 248.

[4] *Ibid.*, para. 250.

[5] *Ibid.*, paras. 249–251 *passim.*

[6] *Ibid.*, paras. 248–250 *passim.*

account of the Scilly Isles as part of the coastline of the United Kingdom but to give them less than their full effect in applying the equidistance method. Just as it is not the function of equity in the delimitation of the continental shelf completely to refashion geography, so it is also not the function of equity to create a situation of complete equity where nature and geography have established an inequity. Equity does not, therefore, call for coasts, the relation of which to the continental shelf is not equal, to be treated as having completely equal effects. What equity calls for is an appropriate abatement of the disproportionate effects of a considerable projection on to the Atlantic continental shelf of a somewhat attenuated portion of the coast of the United Kingdom."

"250. The abatement of these disproportionate effects, as previously indicated in paragraph 27, does not entail any nice calculations of proportionality in regard to the total areas of continental shelf accruing to the Parties in the Atlantic region. This is because, as pointed out in paragraphs 99-101, the element of 'proportionality' in the delimitation of the continental shelf does not relate to the total partition of the area of shelf among the coastal States concerned, its rôle being rather that of a criterion to assess the distorting effects of particular geographical features and the extent of the resulting inequity".[1]

222. In the *Anglo French Continental Shelf Arbitration* the Court applied the factor of proportionality in a manner which completely contradicts the *modus operandi* now sponsored by Libya. As already pointed out the approach of the Court is based on a concept of "distortion" which involves adjustment *with the precise object of maintaining an equality of seaward reach of the mainlands of the two States.* The abatement which was called for and effected took place within a legal framework which excluded a "total partition" of the area of shelf. The lengths of coastlines were not relevant, and proportionality was invoked in a form which maintained a balance between the coasts concerned. In the present case Libya is seeking to use proportionality as a means of establishing a preponderance of seaward control over the submarine areas which divide the Parties.

### ㉞ (iv) *Three Adjacent States on a Concave Coast* (Diagram D)

223. The facts of the *North Sea Continental Shelf* cases involved a situation in which three States were adjacent on a concave coast, and where, but for the concavity of the German coast, the three States have been given broadly equal treatment by nature.[2] The Court set aside the equidistance method precisely because, in the circumstances of the cases with which the Court was concerned, equidistance would produce an

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[1] *Ibid.*, paras. 249-250.

[2] *I.C.J. Reports*, 1969, p. 49, para. 91.

encroachment by the natural prolongation of the territory of one State upon that of the territory of another State.[1]

224. It is well-known that the Judgment in its *Dispositif* includes in the "factors" which are to be taken into account:

> "the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region".[2]

225. The *North Sea* cases are of considerable interest, for here was a geographical situation in which the Court invoked proportionality in a form apparently similar to the version invoked by Libya in the present case, and yet there are considerable points of distinction to be noted. In the first place, the geographical situations are totally different. Secondly, the Libyan mode of proportionality is different in substance. In the *North Sea* cases proportionality had a low normative status as a "factor to be taken into account" and was not classified in the *Dispositif* as one of the "principles and rules" applicable to the delimitation. In the present case Libya invokes proportionality as an independent and primary source of rights.

226. The major point of interest for present purposes lies in the fact that the reasons which moved the Court to set aside equidistance in the *North Sea* cases are fundamentally incompatible with the arguments advanced by Libya in the present dispute. The Court was using the legal idiom of natural prolongation to express a certain practical view. The principle of non-encroachment – which appears in the *Dispositif* as the primary "rule or principle" – involved recognition of the equality of seaward reach of coastal States and is based upon the concept of natural prolongation as the basis of title to adjacent shelf areas. The reasoning of the Court favours maintaining in substance the equal significance of coasts and the reference to proportionality in the Judgment is to be understood in this context.

227. The reasoning and philosophy of the Judgment in the *North Sea* cases is therefore inimical to the Libyan claim in the present case. The Court explains with great care that the intention was not to refashion nature but to reduce inequity "in a theoretical situation of equality within the same order". No major reordering of shares of shelf was envisaged.[3]

228. The Judgment in the *North Sea* cases contradicts the Libyan argument based upon proportionality precisely because it prefers

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[1] *Ibid.*, p. 31, para. 44; p. 46, para. 84; p. 49, para. 91. See also the *Anglo-French Arbitration*, Decision of 30 June 1977, para. 99.

[2] *I.C.J. Reports*, 1969, p. 54, D(3).

[3] *Ibid.*, p. 49, para. 91.

equity, whilst the Libyan position seeks to establish inequality and a preponderance of legal influence for the coasts of one State. The justification for this view of the reasoning in the *North Sea* cases can be found in the subsequent practice of the Parties to those cases. The delimitations which were negotiated by the German Federal Republic[1] on the basis of the principles laid down by the Court indicate that *even in a situation of adjacent States on a concave coast* the effect of the element of proportionality was marginal rather than radical: and this was the result even "in a theoretical situation of equality within the same order". In the geographical circumstances of the present case no such equality within the same order can be said to exist.

㉟ (v) *Adjacent States with Converging Coasts in an Asymmetrical Gulf with a Land Boundary Terminus Located at one Side of the Gulf* (Diagram E)

229. The geographical circumstances envisaged here are of the type presented in the *Tunisia/Libya* case. It will be recalled that in this case the Court applied 'the test of proportionality as an aspect of equity'.[2] However, the approach of the Court was very different from the Libyan *modus operandi* presented in the pleadings in this case. In the *Tunisia/Libya* case the geographical circumstances were quite unlike those of the present dispute, and this difference is so marked that caution is called for in making reference to that decision. Nonetheless the general approach of the Court to the "test" of proportionality can be safely compared to that of Libya in the present case, and such a comparison discloses a critical difference. The Court used proportionality as a "test" in relation to a delimitation which had already been constituted in accordance with various relevant circumstances and, in particular, "the general configuration of the coasts of the parties", "the marked change in direction of the Tunisian coastline between Ras Ajdir and Ras Kaboudia", "the existence and position of the Kerkennah Islands", "the land frontier, and the conduct of the parties".[3]

230. A further difference in approach consists in the fact that the Court did not employ proportionality as an independent source of rights, as Libya now seeks to do. The Court stated emphatically that "the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it".[4] The primary objects of the Court's approach to delimitation were to avoid any undue encroachment in respect of shelf areas adjacent to the Libyan coast as a result of changes in the configuration of the Tunisian coast,[5] and to give proper weight to the conduct of the parties and the *de facto* maritime limit. In

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[1] See the U.S. Department of State, Bureau of Intelligence and Research, *Limits in the Seas*, No. 10 (Revised), at pp. 16-22.

[2] *I.C.J. Reports*, 1982, p. 91, paras. 130-131; p. 93, B(5).

[3] *Ibid.*, pp. 82-89, paras. 114-129; p. 93, B(1), (2), (3) and (4).

[4] *Ibid.*, p. 61, para. 73.

[5] *Ibid.*, pp. 86-89, paras. 122-129.

contrast, the Libyan position in the present case involves using proportionality not as a test of inequity of a primary delimitation which has been designed on grounds other than proportionality in order to avoid encroachment, but as the primary basis for a delimitation which is characterised by a major inequality of seaward extension and a massive encroachment on submarine areas adjacent to the coasts of Malta.

### 6. MALTA'S POSITION IS COMPATIBLE WITH THE FRAMEWORK OF LEGAL PRINCIPLE

231. The factor of proportionality is applicable within a framework of legal principle of which the key elements are as follows:

(*a*) The delimitation to be effected must reflect the legal basis of title, which is the coast of the territory of the State and the geographic correlation between coast and submerged areas off the coast.

(*b*) In consequence, the concepts of adjacency and distance, which are correlatives of the legal basis of title, justify an equality of seaward extension of sovereign rights in respect of coasts abutting upon the submarine areas in dispute.

(*c*) The criterion or factor of proportionality is a general test of the equity of a delimitation effected on other bases and is not an independent source of rights.

(*d*) The geographical circumstances as a whole form the primary guide to an equitable result.

(*e*) The actual relationship of coasts and not coastal lengths in the abstract are to be taken into account.

(*f*) In the case of opposite coasts the presumption of the equality of seaward extension of sovereign rights is at least as strong as in other geographical situations.

(*g*) Even when some adjustment or modification of the primary boundary indicated by the balance of geographical circumstances is justified in principle, such adjustment cannot be so radical in result as to create a preponderance of influence for the coasts of one State in the area in dispute.

232. The Libyan arguments relating to proportionality are based on fundamental misconceptions of principle and thus disregard the elements of the legal framework set forth above. The eccentricity of the Libyan position is demonstrated by reference to the practice of States which reveals that (in terms of seaward reach) short coast States suffer no legal disability as against long coast States in the context of delimitation.[1] A clear illustration of this is provided by the delimitation between India and the Maldives established by agreement in 1976. According to The Geographer of the United States Department of State,

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[1] For the practice of States generally see the Maltese Memorial, Chapter VII, sections 3–5; and Counter-Memorial, pp. 111–123, paras. 252–257. See also Annex 4 of this Reply.

"the boundary closely approximates an equidistant line".[1] This alignment thus gives equal weight to the continental landmass of southern India and the northern aspect of an elongated chain of atolls. The delimitation involves a "maritime boundary" which delimits "sovereign rights and exclusive jurisdiction over the continental shelf and the exclusive economic zone".[2] Similarly, the pattern of delimitation in the Gulf, involving Iran and States opposite, gives no support whatsoever to the Libyan thesis of the preponderant effects of long coasts.

233. In contrast to the arbitrary and extravagant claim of Libya, which is based directly upon proportionality, though not upon the legal conception of this factor, the position of Malta is entirely compatible with the key elements of the framework of legal principle set forth above. This compatibility with the legal framework is amply confirmed by the practice of States in comparable situations, and the importance of this confirmation is no doubt the reason for Libya's abhorrence of the relevant practice of States. The legal significance of this practice will be examined in Part VI of this Reply.

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[1] *Limits in the Seas*, No. 78, p. 7; Maltese Memorial, pp. 62, 65-66.

[2] *Ibid.*, p. 3; Article IV.

# PART VI

# STATE PRACTICE: ITS RÔLE IN CONFIRMING THE VALIDITY OF MALTA'S POSITION

## CHAPTER XIV

## CRITICISM OF THE *MODUS OPERANDI* OF THE LIBYAN COUNTER-MEMORIAL

### INTRODUCTION

234. In its written pleadings Malta has made appropriate reference to State practice. The substantial evidence thus submitted will, it is believed, be of assistance to the Court, more especially since the application of legal principles should be assessed in terms of available experience. The Libyan Memorial, it may be recalled, avoided any reference to State practice.[1] The Libyan Counter-Memorial has belatedly turned to the materials of State practice in seeking to refute Malta's arguments. The outcome is contradictory, since the Libyan Government at one and the same time asserts the irrelevance of practice *tout court* and contends that the practice does not support Malta's views on delimitation in the present case.

235. The *modus operandi* adopted in the Libyan Counter-Memorial combines several procedures. The first consists of misreporting the argument of Malta; the second takes the form of a generalized attempt to discount State practice; and the third procedure involves a substantial misinterpretation of the various delimitation agreements which form a part of the evidence of State practice. These procedures will be examined *seriatim* in this Chapter and the next. The Libyan misinterpretation of various delimitation agreements is also the subject of an expert opinion prepared by a leading authority on maritime boundary, Dr. J. R. V. Prescott. The opinion is submitted as Annex 4 of this Reply.

### 1. LIBYAN MISSTATEMENT OF MALTA'S ARGUMENTS

236. In the context of reference to State practice Libya once again insists that Malta contends that the "application of the equidistance method is a principle or rule of customary international law in the delimitation of the continental shelf".[2] This is not Malta's position. Malta considers that State practice "gives the strongest possible in-

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[1] However, somewhat inconsistently the Libyan Memorial departs from this policy on three reasons. (See Maltese Counter-Memorial pp. 33-35).

[2] Libyan Counter-Memorial, p. 117, para. 5.49.

dication of the appropriateness — the equitable nature — of the method of equidistance in delimitation of the areas of continental shelf which appertain to Malta and Libya respectively";[1] and that this is Malta's view is acknowledged in the text of the Libyan Counter-Memorial.[2] The statement that in certain types of geographical situations the equidistance method constitutes an equitable solution is not equivalent to the statement that the method "is a principle or rule of customary international law".

237. In this and other contexts the Libyan argument assumes an artificial aspect. The fact that equidistance is not "obligatory" or "a rule of law" does not have the consequence that resort to the method of equidistance is *in no circumstances* equitable and legally appropriate. Malta does not seek to offer inflexible axioms which have no place in the contemporary law but to examine all the material which is relevant to the issue of what is an equitable solution in the present case. Of the material available State practice appears to be perhaps the most relevant.

## 2. THE LIBYAN ATTEMPT TO DISCOUNT STATE PRACTICE *tout court*

238. The written pleadings of Malta have, quite naturally, made reference to State practice relating to analogous geographical situations as a part of the evidence of the practical application of equitable principles in negotiated delimitation agreements concerning areas of continental shelf and exclusive economic zones. In contrast, the Libyan pleadings not only neglect the pertinent State practice, but also insist, in an artificial and doctrinaire way, that reference to State practice is inadmissible for a variety of reasons.

239. The Libyan fear of State practice involves no less than eight assertions which, both individually and by their number, demonstrate the existence of a tactical need to keep all practice out of the picture.

### (i) *The Assertion that no Situations are Analogous*

240. In the first place there is the complaint that the situations offered as comparable in geographical terms by Malta are somehow not "analogous"[3] and therefore, in the Libyan view, not comparable. At the same time Libya is quite prepared to offer an examination of certain instances of State practice with the purpose of establishing that certain agreements have "key aspects" which are "unfavourable to Malta's case".[4] By so acting Libya clearly shows that even in situations which are not analogous a comparison is not only perfectly possible but also justified.

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[1] Maltese Memorial, para. 195; and see also paras. 109, 272.
[2] Libyan Counter-Memorial, pp. 118–119, paras. 5.50–5.52.
[3] *Ibid.*, p. 4, para. 9.
[4] *Ibid.*, p. 126, para. 5.68.

### (ii) *The Assertion that Every Situation is "Geographically Unique"*

241. The Libyan Counter-Memorial goes as far as to assert that "if State practice demonstrates anything therefore, it is that each case has its own unique setting and own peculiar facts".[1] Whilst geographical circumstances are infinitely varied, this dogmatic denial of comparability is contradicted by the fact that States involved in disputes relating to maritime boundaries habitually invoke comparable situations in preparing their written and oral arguments for presentation to international tribunals. Such a denial of comparability ignores the dictates of common sense. If individual geographical situations can be assessed by tribunals for the purpose of achieving an equitable solution, then no doubt it must be possible to make comparisons in terms of the equity of different delimitations.

### (iii) *The Assertion that State Practice Rarely Specifies All the Factors Taken into Consideration*

242. The Libyan Counter-Memorial states that State practice "must be viewed with some caution" because "State practice and particularly delimitation agreements, rarely specify all the factors considered by the parties in reaching the ultimate solution".[2] This observation is undeniable as a general observation but it lacks point. The transactions of states may be accompanied by a variety of motives, some of which will be political and some of which will relate to collateral benefits having no direct relation to the subject-matter. But to say so is banal. The legal significance of State practice cannot be discounted on such a basis. Provided there is an actual or presumed reference to legal criteria, the practice concerned will have evidential significance.

243. Whilst the Libyan assertion quoted above may be true of State practice in a general way (whether it concerns continental shelf delimitation or any other topic of general international law), it is contradicted by some recent examples of practice relating precisely to the continental shelf. Thus a number of agreements, such as the convention between Spain and Italy on 19 February 1974[3] and the agreement between Italy and Greece, signed on 24 May 1977,[4] expressly state that the criterion of equidistance is the basis of the delimitation. Moreover, the recent agreements between France and Mauritius,[5] and France and St. Lucia,[6] expressly state in their preambles that the application of the equidistance method constitutes an equitable system of delimitation.

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[1] *Ibid.*, pp. 134-135, para. 5.96; and see also p. 119, para. 5.52; and p. 124, para. 5.63.

[2] *Ibid.*, p. 120, para. 5.54.

[3] See Maltese Memorial, Annex 63.

[4] *Ibid.*, Annex 64.

[5] *Ibid.*, Annex 57.

[6] *Ibid.*, Annex 60.

### (iv) *The Assertion that the Court in the North Sea Cases Ruled out the Use of State Practice*

244. The Libyan Counter-Memorial[1] invokes the Judgment of the Court in the *North Sea*[2] cases to the effect that a rule of customary law can only emerge on the basis of a "settled practice" accompanied by a sense of legal obligation. These statements of general principle relating to the formation of new rules of customary law are as such, of course, uncontroversial; and in the *North Sea* cases the Court was addressing itself to the specific argument whether the equidistance/special circumstances rule was *obligatory* in the context of general international law. No such proposition has been offered in the present case. Thus the assertion of the Libyan Counter-Memorial[3] that the evidence does not support the view that equidistance is "obligatory" or "automatic", involves nothing more than an assault on a target invented by Libya for its own forensic purposes.

### (v) *The Assertion that State Practice is Inadmissible if it is "Unilateral"*

245. The Libyan view is that "unilaterally enacted legislation" does not count as State practice.[4] This assertion is surprising, since much State practice is by definition "unilateral". It is generally accepted that the evidence of the practice of States includes legislation: hence the value of the *United Nations Legislative Series*. Obviously the legislation by States is, inevitably, enacted "unilaterally"

### (vi) *The Assertion that not Enough State Practice is Available*

246. The Libyan Counter-Memorial offers the further argument that the State practice is unreliable because "many delimitations remain to be established throughout the world".[5] The fact remains that a significant number of delimitation agreements have already been concluded with reference to situations which are geographically comparable, and these agreements, together with the pertinent national legislation, constitute a respectable body of evidence relating to the nature of an equitable result in the present case.[6]

### (vii) *The Assertion that the Number of "Unresolved Shelf Boundaries is Eloquent Testimony against ... Equidistance"*[7]

247. This statement reveals a lack of understanding of the problems affecting boundary negotiations. In fact, it can be said with confidence

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[1] Pp. 120–122, paras. 5.55–5.58.
[2] *I.C.J. Reports*, 1969, pp. 43–45, paras. 76–78.
[3] P. 121, paras. 5.56–5.58.
[4] Libyan Counter-Memorial, p. 123, para. 5.62.
[5] *Ibid.*, p. 135, para. 5.97.
[6] See also, in this respect, Annex 4.
[7] Libyan Counter-Memorial, p. 110, para. 5.28.

that whatever the number of unsettled boundaries this is no criticism of the validity of the equity of equidistance. There can be a variety of reasons why a boundary remains unresolved and Malta will here suggest only the most obvious ones.

First of all equidistance can only be applied when the basepoints to be used and their location have been agreed. This is a matter which is often the cause of lengthy discussions and delays.

Secondly, many boundaries remain undefined for reasons which have nothing to do with equidistance. For example:

(a) some countries, such as Australia and New Zealand, do not negotiate their common maritime boundaries because they do not consider it a matter of urgency; (b) other countries, especially those which have recently become independent have more pressing problems, domestic or otherwise, that take precedence; (c) some countries cannot at present enter into negotiations with a neighbour for political reasons, such as non-recognition or a difference in ideologies; (d) there are very few maritime boundaries around the African continent (except in the Mediterranean) that urge an early settlement, partly because most of these African countries either do not have important fishing grounds or important fishing fleets, and few have a realistic prospect of finding petroleum or natural gas on their very narrow continental shelves.

Thirdly there are, in several cases, disagreements on matters other than the method of delimitation which prevent the boundaries from being delimited. Such are for example: (a) disagreements over ownership of territory, whether islands or sections of mainland; and (b) disagreements as to the interpretation of boundary agreements concluded prior to independence. The former disagreements explain unsettled boundaries between Venezuela and Guyana, Argentina and Chile, France and Vanuatu and in certain areas of the South China Sea. Problems of the second kind face Canada and the U.S.A.; U.S.A. and the Soviet Union; the Philippines and Indonesia; China and Vietnam, to mention but a few.

### (viii) *The Assertion that Malta has Relied on "Selective" State Practice*

248. The Libyan Counter-Memorial accuses Malta of relying on State practice of a "selective nature"[1] and refers to some agreements which "Malta has elected to ignore."[2] Malta's first reply to this criticism is that Libya conveniently forgets here its previous contention[3] that no two situations are analogous, and consequently none are comparable. Malta of course does not consider that *all* situations are analogous and, therefore, in invoking delimitations to support its submissions it must choose agreements in comparable situations. In other words it *necessarily* has to be selective. At the same time Malta is

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[1] *Ibid.*, p. 132, para. 5.87.

[2] *Ibid.*, p. 132, para. 5.88.

[3] See para. 239 above.

confident that it has produced evidence, both in its Memorial[1] and in its Counter-Memorial[2], which demonstrates that, as a general and persistent pattern, State practice in *analogous situations* indicates that the equidistance method gives an equitable solution.

249. As to Malta's "omissions", Malta does not deny that there may be a small minority of agreements which do not coincide with its views of equity in the present case. What is difficult to understand is why it is thought by Libya that the existence of this small minority subverts the general pattern of delimitations invoked by Malta. On this aspect of Libya's argument Malta would make one final observation. The delimitations introduced by Libya as examples supposedly "ignored" by Malta *give no support to Libya's position in the present case.*[3]

### 3. CONCLUSION THE EXTRAORDINARY CHARACTER OF THE LIBYAN ATTACK ON STATE PRACTICE

250. The Libyan position is that State practice is inadmissible *tout court*, as evidence on the issue of what would constitute an equitable solution in the present case and, consequently, in respect of all issues concerning delimitation of areas of continental shelf. Apparently State practice is admissible only for the negative purpose of establishing the proposition that:

> "If State practice demonstrates anything therefore, it is that each case has its own unique setting and its own peculiar facts. As the former Geographer to the United States Department of State has observed, 'every maritime boundary situation is geographically unique'. Consequently, States have resorted to a wide variety of solutions to ensure that they reach a satisfactory result in each particular case."[4]

251. This conclusion to the pertinent chapter of the Libyan Counter-Memorial is exceptional to a degree. The law relating to the continental shelf has its roots in customary law and, in the law of treaty interpretation, the subsequent practice of the parties has a significant role. Moreover, in various parts of international law bilateral agreements are commonly recognized as evidence of the mode of application of the relevant international standard, for example, in relation to the use of international rivers or to the treatment of aliens and their property. According to Libya, the law relating to delimitation of continental shelf areas forms an enclave, an area of juridical eccentricity, in these matters.

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[1] Pp. 61-96, paras. 185-194.

[2] Pp. 111-123, paras. 252-256; pp. 133-134; paras. 274-275.

[3] See also Annex 4.

[4] Libyan Counter-Memorial, pp. 134-135, para. 5.96.

# CHAPTER XV

## THE SO-CALLED "TRENDS AWAY FROM EQUIDISTANCE" AND STATE PRACTICE

### 1. THE LIBYAN CONTENTION

252. The Libyan Counter-Memorial misstates the position of Malta when it asserts that Malta presents the equidistance method as "a principle or rule of law"; and this failure to state Malta's arguments accurately has already been the subject of comment in previous Chapters of this Reply. The failure to reflect Malta's argument concerning equidistance is closely related to two other tactics adopted in the Libyan Counter-Memorial. The first is the insistence on "the progressive disappearance of any distinction between 'opposite' and 'adjacent' States". Malta has subjected this thesis to critical analysis and has affirmed the continuing significance of the distinction.[1] The second tactic takes the form of a thesis that since 1969 there have been "clear trends away from equidistance manifested in the jurisprudence, in delimitation agreements between States, and in the deliberations of the Third Conference on the Law of the Sea."[2] Malta has already rejected this thesis with particular reference to the jurisprudence and to the Third Conference on the Law of the Sea.[3]

253. In the present Chapter it remains to examine the evidence offered by Libya for the view that the State practice in the form of delimitation agreements supports the thesis of the "trends away from equidistance."[4] It may be observed in passing that the Libyan argument does not hesitate to invoke State practice when it is supposed to give substance to a view espoused by Libya.[5]

### 2. THE ERRORS IN THE LIBYAN ASSESSMENT OF STATE PRACTICE

254. The errors in the Libyan assessment of State practice will be examined here broadly in terms of types or categories. A more systematic commentary upon the Libyan assessment of individual de-

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[1] See paras. 120-122 above.

[2] Libyan Counter-Memorial, pp. 102-112, paras. 5.01-5.33.

[3] See above Chapter VI, Part II, paras. 102-106.

[4] Libyan Counter-Memorial, pp. 104-110, paras. 5.10-5.28.

[5] See fn. 1 to para. 234 above.

limitation agreements, with particular reference to the "Comments" contained in the Annex of Delimitation Agreements appended to the Libyan Counter-Memorial, will be found in the expert opinion of Dr. J. R. V. Prescott annexed to this Reply.[1]

### (a) *Irrelevant Statements*

255. In the first place the treatment of State practice in the Libyan Counter-Memorial involves a number of completely irrelevant statements. Two examples may be given. Thus the Truman Proclamation of 1945 is invoked to show that it "made no reference to equidistance as the basis for delimitation with neighbouring States."[2] This observation cannot carry much weight, since it is well known that the law relating to the continental shelf was just emerging in 1945. In any case it cannot be assumed that the reference to resort to agreement in accordance with "equitable principles" in the Truman Proclamation is inimical to the role of equidistance. So much so that the United States have agreed to several maritime boundaries on the basis of equidistance.[3] Secondly, the Libyan argument invokes the Judgment in the *North Sea* cases to support the proposition that "there was no rule of customary international law requiring the use of equidistance."[4] As so often in the Libyan pleading the assertion is beside the point. Malta has not contended that equidistance is a mandatory rule; moreover, in point of fact, the Judgment in the *North Sea* cases allowed a significant role to the equidistance method.

### (b) *The Statement that Many Agreements do not Specify the Method upon which Delimitation was Based*

256. The Introduction to the Annex of Delimitation Agreements which accompanies the Libyan Counter-Memorial places emphasis upon the fact that "textually, a large number of agreements do not specify the precise method upon which the delimitation was based."[5] To the limited extent that this may be true, there is no reason to believe that an agreement is thus deprived of evidential significance. There are a number of uncomplicated ways in which the elements of equidistance can be detected in a delimitation[6] and it is not the practice of commentators to exclude the evidence of agreements on the basis that they contain no express declaration of the method of delimitation adopted. Not even the Libyan Counter-Memorial observes this "pro-

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[1] Annex 4.

[2] Libyan Counter-Memorial, p. 105, para. 5.12.

[3] See e.g., U.S.A.-Mexico, U.S.A.-Cuba, U.S.A.-Venezuela and U.S.A.-New Zealand Agreements.

[4] *Ibid.*, pp. 105-106, para. 5.14.

[5] P. 2, para. 8.

[6] See Annex 4.

hibition" when it finds it convenient to invoke agreements in support of a Libyan argument. A perusal of the series published by The Geographer of the United States Department of State, *Limits in the Seas*, reveals that successive holders, of that appointment have found no difficulty in analysing the basis of delimitations with the assistance of normal techniques.

### (c) *Persistent Under-Estimation of the Incidence of the Equidistance Method in Delimitation Agreements*

257. On a significant number of occasions the Libyan Counter-Memorial, both in the principal text and in the Annex of Delimitation Agreements, produces a considerable under-estimate of the incidence of the equidistance method in such delimitation agreements. This is a persistent feature of the Libyan pleading, and the examples of this under-estimate of equidistance are chronicled systematically in Dr. J. R. V. Prescott's opinion.[1]

258. The under-estimation generally takes the form of pointing out that certain segments of a delimitation are not based on equidistance, even though in fact the line is substantially the result of applying the equidistance method. This approach is to be seen – for example – in the comments on the delimitations between Bahrain and Saudi Arabia and between Iran and Oman.[2] A further tactic is to refer to adjustments due to the presence of islands as though such adjustments involve a legally significant divergence from equidistance when in fact they do not: see, for example, the treatment of the delimitations between Italy and Yugoslavia, between Iran and Saudi Arabia, and between Cuba and the United States.[3]

259. It would be tedious to explore every fault in the parts of the Libyan Counter-Memorial dealing with State practice, and one further example will suffice. Malta is taken to task for having invoked the delimitation between the Maldives and India and for having ignored "key aspects" of the agreement "which are unfavourable to Malta's case."[4] The substance of the Libyan complaint is that "most of the delimitation line was governed on the Indian side not by its mainland coast, but by the tiny island of Minicoy lying well out to sea." The fact remains that *that part of the delimitation which is governed by the Indian mainland clearly gives equal effect to the Maldives and to the Indian mainland*. The reference to the sector governed "by the tiny island of Minicoy" can hardly support Libya's case. In the first place, the island of Minicoy, so far from the Indian mainland, is clearly accepted as the controlling coast and not the mainland. Secondly, if Minicoy is given equal weight *as against the Maldives*, how does this support the Libyan position?

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[1] Annex 4.

[2] Libyan Counter-Memorial, Annex of Delimitation Agreements Annexes 5 and 40.

[3] *Ibid.*, Annexes 14, 17 and 53.

[4] Libyan Counter-Memorial, p. 126, para. 5.68.

### (d) *An Unwarranted Emphasis on the Fact that an Alignment was "Negotiated"*

260. Both in the Introduction to the Annex of Delimitation Agreements[1] and in comments on specific delimitations, the Libyan Counter-Memorial places emphasis on the fact that a line was "negotiated", apparently on the supposition that this obvious truth weakens the significance of reliance upon the equidistance method in the particular agreement. This supposition flies in the face of ordinary logic. The element of equidistance, with or without adjustment on the basis of considerations of legal principle or political bargain, will be evident and legally significant *if it was the result of the negotiation*, as it clearly was in a considerable number of instances.

261. Two examples of this attempt by Libya to diminish the significance of a delimitation on the ground that it was "negotiated" will suffice to indicate the air of unreality which surrounds this tactic. The agreement between Mexico and the United States is undoubtedly based upon equidistance, and this in both sectors, and yet the "Comments" in the Libyan Annex describe the alignment as "a negotiated boundary".[2] Similarly, the delimitation between Cuba and the United States is described in the Annex simply as "a boundary every turning point of which has been established by negotiation."[3] In fact, the establishment of the boundary involved the use of a median line and this fact is attested in an article published by an official of the Office of the Geographer of the United States Department of State.[4]

### (e) *The Fact that States Sometimes Use other Methods of Delimitation*

262. A further tactic adopted in the Libyan Counter-Memorial is to stress the fact that "there is no one method of delimitation that States have felt compelled to use in every situation."[5] This is another variant of the persistent assertion that Malta has advanced equidistance as a "mandatory" or "obligatory" rule. This is not Malta's position and it goes without saying that in certain circumstances the equidistance method will not produce an equitable solution, and, in consequence, some other method of delimitation will be employed. The fact, however, remains that what State practice shows is that these cases are few in number and in the large majority of cases the delimitation was based on equidistance.

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[1] *Ibid.*, Vol. II, p. 2, para. 9.

[2] *Ibid.*, Annex 23.

[3] *Ibid.*, Annex 53.

[4] R. W. Smith, 1981, Maritime Boundaries of the United States *Geographical Review*, Vol. 17, p. 402. See also Annex 4.

[5] Annex of Delimitation Agreements, Introduction, p. 3, para. 12. See also the Libyan Counter-Memorial, pp. 104-110, paras. 5.10-5.27, *passim*.

### (f) *Conclusion: The Libyan Thesis of the "Trends Away From Equidistance" is False*

263. The errors in the Libyan assessment of the State practice for the purpose of establishing the thesis of the "trends away from equidistance" are so persistent and so egregious that the results of the assessment are evidently unreliable.

264. The Libyan assessment is also incorrect, and the principal indicator of the falsity of the Libyan thesis is, quite simply, the general pattern of agreements relating to the delimitation of continental shelf areas. In the Annex which accompanies Malta's Reply[1] delimitation practice is subjected to careful analysis and the incidence of the equidistance method, especially in the case of opposite States, is seen to be very marked. Thus out of fifty agreements involving opposite States, only six were not based either in whole or in part on the equidistance method. Moreover, in respect of all delimitation agreements concluded after 1969, only nine, out of a total of fifty four delimitations were not based either in whole or in part on the equidistance method.[2]

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[1] Annex 4.

[2] See Annex 4.

## CHAPTER XVI

## THE LEGAL SIGNIFICANCE OF STATE PRACTICE IN CONFIRMING THE EQUITY OF THE EQUIDISTANCE METHOD

### 1. General Recognition of the Significance of State Practice

265. What may be described quite properly, as the Libyan fear of State practice, has resulted in the adoption of a position which contradicts normal practice in the handling of the materials of international law. Libya is presumably well aware of the general tendency for State practice to be referred to, more or less extensively, in the written pleadings presented to international tribunals in the recent past.[1] It is piquant to notice that in the *Tunisia–Libya Case* the Libyan Memorial did not hesitate to invoke State practice,[2] and indeed, in the present proceedings the Libyan Memorial has relied upon State practice in three separate contexts.[3] Recent contributions to the literature routinely examine the relevant practice on questions of continental shelf delimitation.[4] The substantial study entitled "Maritime Boundary" presented by Dr. Jagota, in a course of lectures delivered at The Hague Academy in 1981,[5] is largely founded on an extensive reference to State practice.

266. In the present stage of the evolution of the law relating to maritime delimitation, the evidence of State practice has particular value. In combination with the developing jurisprudence of international tribunals the growing stock of delimitation agreements constitutes an objectively very powerful indication of what is deemed to be equitable in a variety of geographical situations. It goes without saying that such application of equitable principles must be "examined within the context of customary law and State practice" as in the case of other concepts and principles.[6]

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[1] See the *Anglo–French Arbitration* Decision of 30 June 1977 pp. 79–80, para. 156; pp. 84–85, para. 170; pp. 94–95, paras. 199–200.

[2] p. 43, the whole of Chapter IV.

[3] For the details see Maltese Counter-Memorial, pp. 33–35, paras. 64–67.

[4] See the works of Professor Bowett, *The Regime of Islands in International Law*, 1982, pp. 169–183, 271–277; and the late Professor O'Connell, *The International Law of the Sea*, Vol. I, 1982, Vol. II, 1983.

[5] *Recueil des Cours*, Vol. 171 (1981, II), p. 83.

[6] See the Judgment of the Court in the *Tunisia–Libya* case, *I.C.J. Reports* 1982, p. 46, para. 43.

## 2. Certain Admissions by Libya Concerning the Seaward Reach of Coasts

267. The section of Chapter 5 of the Libyan Counter-Memorial which is devoted to "State Practice Relating to Continental Shelf Delimitation" includes passages criticising the use by Malta of certain delimitation agreements in support of its argument.[1] These passages, however, also contain important admissions of the validity of some key elements in Malta's position.

268. Thus in its Memorial[2] Malta invoked the Agreement which established a delimitation between the Norwegian coasts and Denmark (in respect of the Faroes). The Libyan Counter-Memorial makes two points:[3]

(i) The first is that the delimitation is affected by delimitations between neighbouring States. That may be so. However, it does not in any way limit the relevance of the agreement for present purposes, since both the Faroes and the mainland of Norway were accorded an equal potential in terms of seaward reach. The Libyan Counter-Memorial does not contradict this element in Malta's exposition.

(ii) The second point made is that the "relevant stretch" of the Norwegian coast is short: and that "the delimitation line in this instance is in all likelihood governed by a single point on the Norwegian coast".[4] This "criticism" involves an acceptance of the point developed in Maltese Memorial,[5] namely, that short abutting coasts may play a significant role in delimitation.

In conclusion the points made by Libya leave intact, and indeed confirm, the significance of the delimitation: that the Faroes are given a seaward extension equal to that of the mainland of Norway in the relations of the two opposite coastal States, Denmark and Norway.

269. The Libyan Counter-Memorial next refers to the delimitation between Bahrain and Iran.[6] Again the equality of seaward extension of the coasts of the two opposite States is not denied. Instead, three obfuscations are produced. Two are irrelevant matters: thus it is stated that there are third State delimitations in "the immediate vicinity" and that "the delimitation line is only 54 kilometres long". The third is the assertion that the delimitation "is not based exclusively on equidistance". The fact is that it is based substantially on equidistance.[7] Moreover, this and other delimitations like it, not only do not even begin to justify a division of shelf areas of the type proposed by Libya in the present case but contradict it.

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[1] Pp. 125–128, paras. 5.65–5.75.

[2] P. 39, para. 125.

[3] P. 125, paras. 5.65–5.66.

[4] Para. 5.66.

[5] Pp. 37–39, paras. 121–126.

[6] Pp. 125–126, para. 5.67.

[7] Maltese Memorial, p. 62, para. 185 (a). See also Annex 4.

### 3. The Significance of State Practice in the Present Case Reaffirmed

270. The legal significance of State practice in the present case is reaffirmed by Malta. That significance has several facets and these will now be summarised.

(*a*) State practice confirms the entitlement of island States to appurtenant shelf areas on a basis of equality with other coastal States.[1]
(*b*) State practice likewise provides clear indications that in comparable geographical situations, the equidistance method was considered by the parties as producing an equitable result.[2]
(*c*) State practice effectively contradicts the Libyan thesis based upon the ratio of coastal lengths and the use of proportionality as a primary source of continental shelf rights.[3]
(*d*) State practice likewise effectively contradicts the Libyan thesis of the significance of "the land mass behind the coast" and the consequent "greater intensity" of the natural prolongation.[4]
(*e*) Finally State practice effectively contradicts the Libyan thesis that geological and geomorphological features control the delimitation of continental shelf boundaries.[5]

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[1] Maltese Memorial, pp. 48–51, paras. 154–157; p. 54, para. 165.
[2] *Ibid.*, pp. 61–96, paras. 184–195.
[3] Maltese Counter-Memorial, pp. 111–123, paras. 252–257.
[4] See para. 79 above; See also Annex 4.
[5] See above, paras. 70–71; see also Annex 4.

## SUBMISSIONS

271. Malta, respectfully requesting the Court to reject Libyan submissions to the contrary, repeats and confirms the submissions which it has made in its Memorial and Counter-Memorial.

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Edgar Mizzi
Agent of the Republic
of Malta.

# ANNEXES TO THE REPLY OF MALTA

## Annex 1

### EXTRACT FROM NOTES ON TALKS OF 10 APRIL 1974

"Mr Ben Amer reiterated that Libya could not accept the principle of equidistance just as Malta could not accept the principle of proportionality. Because of this Mr Ben Amer came with a concrete proposal namely that both sides would forget their stands and would reach a compromise agreement.

The Prime Minister stated that this proposal had already been made before through Mr Ben Amer and that he had informed Mr Ben Amer himself and later also the President that this was not acceptable."

## Annex 2

### LETTER FROM EXXON DATED 25 JUNE 1975 TO MR. C. V. VELLA, CHARGÉ D'AFFAIRES, PERMANENT MISSION OF MALTA TO THE UNITED NATIONS

June 25, 1975.

Dear Mr Vella:

This letter will acknowledge receipt of your letter dated June 23, 1975, addressed to Mr J. K. Jamieson, wherein you advise of your understanding that Exxon Corporation is conducting certain oil exploration activities within an offshore area over which you state that the Republic of Malta maintains full sovereignty rights. On behalf of the Republic of Malta, you request a categoric assurance from our company that no such exploration or drilling activities are being or will be carried out in any part of the described area.

During 1974, Esso Standard Libya Inc. (Esso Libya), an affiliate of Exxon Corporation, entered into an Agreement with the National Oil Corporation, a Libyan corporation, and owned by the Libyan Government, under which Esso Libya is authorized to conduct exploration and production operations, including seismic, within a certain defined Area offshore the Libyan Arab Republic. A comparison of the offshore coordinates contained in Esso Libya's Agreement with the coordinates set out in your letter indicates an area in conflict.

We are informed that the Libyan Government is aware of Malta's position as to the demarcation of its offshore boundary; however, the Libyan Government recently advised Esso Libya that it exercises sovereign rights over all of the offshore Area covered by the 1974 Agreement. At the present time, Esso Libya's contractor is conducting seismic operations offshore Libya. However, Esso Libya advises that no seismic operations have been conducted within the area claimed by Malta, nor has Esso Libya conducted any drilling operations within such area.

It is in the interests of all concerned that both of the involved Governments seek an early resolution of this question so that offshore development can proceed in an orderly manner. It is our earnest desire that this matter be resolved at an early date.

Very truly yours,

Charles J. Hedlund

## Annex 3

### NOTES OF MEETING OF 23 APRIL 1980

On his visit to Tripoli on April 23, 1980, and at the various meetings, the Prime Minister was accompanied by Edgar Mizzi, Karm Vella and Martin Zammit, who travelled with him, and Maurice Lubrano who joined the delegation in Tripoli. Mr Shweidi and Mr Sweidan also travelled with the Prime Minister and Mr Shahati and Mr Al Atrex, from the Libyan side were also present at the various meetings.

The Prime Minister had three meetings: the first was with Mr Shahati, the Secretary in charge of Popular Committees abroad, Mr At-Talhi, the Secretary of the General People's Committee and Major Jalloud.

...... .......

*Meeting with Major Jalloud*

The Prime Minister said the People of Malta would understand that Libya could not continue to supply Malta with oil at current prices forever. What the Maltese people could not understand – and the Prime Minister could not explain to them – was the continued refusal by Libya to reach some agreement on the dividing line. The Prime Minister added that he attached such importance to this question that he preferred to go back to Malta without any agreement on oil but with an acceptable agreement on the dividing line.

Jalloud recalled the suggestion he had made at the meeting of October 1979; but the Prime Minister pointed out that two proposals had been made at that meeting, one by Malta and the other by Libya, and both had failed to obtain an agreement. There had also been a further meeting of experts but this too had been inconclusive because the Libyans had never seriously wanted to reach an agreement with Malta but had continuously used delaying tactics to prevent Malta from drilling for oil. This had now to stop; and as he had given warning at the other meeting, the Libyan Government has since been formally notified that the Maltese Government intended to drill on its continental shelf leaving out only, and for the time being, a band 15 miles wide.

At this Major Jalloud showed surprise, and added that he knew nothing about this decision. He also said that Libya would protest against and resist such an action.

The Prime Minister retorted that Malta would not be deterred, and that Libyan–Maltese relations would be seriously affected if Libya tried to prevent Malta from enforcing her rights.

Jalloud said he was assured that no company would drill for Malta, not even if another Government were involved.

The Prime Minister said that events would show how correct that statement was. In this context Jalloud asked why Malta had given AMOCO a concession which encroached on Libya's claims. The Prime Minister answered all the current concessions – including AMOCO's – dated as far back as 1974/75. Thev were given at a time when an agreement to go to the International Court of Justice appeared imminent. In fact an agreement was reached, and it was signed in the presence of Col. Ghaddafi himself in Malta in 1976. But Libya had then repudiated it.

The failure by Libya to ratify that Agreement was the most damaging act Libya had ever done to Malta and to the Malta Labour Party. For four years Libya had, so to speak, used that stick with which to beat the Maltese Labour Party.

On its part the Maltese Government had doggedly tried to reach an agreement and avoid confrontation. It had failed, and now had no option but to enforce its rights and drill. Speaking in English, Jalloud at this point said: "We will go to the Court in June". In reply to the Prime Minister's query as to how this could take place, Jalloud said: "The Agreement which was signed (i.e. the 1976 Agreement) will be ratified by the Congresses in June, and we will then go to the Court."

## Annex 4

## EXPERT OPINION ON STATE PRACTICE: AN OPINION

*by* DR. J. R. V. PRESCOTT

## OPINION

On certain aspects of the submissions concerning the delimitation of maritime boundaries contained in the Counter-Memorial of the Socialist People's Libyan Arab Jamahiriya filed on 26 October 1983.

by

J. R. V. PRESCOTT

*Reader in Geography*
*University of Melbourne*

## INTRODUCTION

1. This opinion examines the Counter-Memorial submitted by the Socialist People's Libyan Arab Jamahiriya on 26 October 1983 in their Continental Shelf case with the Republic of Malta pending before the International Court of Justice. The examination has been made with particular reference to the Annex of Delimitation Agreements submitted by Libya and has the purpose of assessing the validity and accuracy of certain assertions made, or conclusions reached, with respect to the delimitation of maritime boundaries and the role, for that purpose, of the method of equidistance.

2. This opinion considers, in particular, the following matters:

1. The Identification of Maritime Boundaries which involve the Method of Equidistance.
2. The Libyan Analysis of Specific Boundary Agreements.
3. The Rôle of Equidistance in Maritime Boundary Agreements since 1969.
4. The Rôle of Physical Features and of Different Coastal Lengths in Maritime Boundary Agreements.

## 1. THE IDENTIFICATION OF MARITIME BOUNDARIES WHICH INVOLVE THE METHOD OF EQUIDISTANCE

3. Only some of the agreements which involve the use of equidistance announce this fact in the preamble. The analyses of agreements in the Libyan Counter-Memorial usefully identify those cases where such an announcement is made. Where the use of equidistance is present without having been specifically declared, it is necessary to consider how it can be detected.

4. The first step is to mark any straight baselines proclaimed by the Parties on the chart with the largest most convenient scale. In short boundaries it will be possible to use scales of say 1:500,000. On such charts 1 centimetre would represent 500 metres, which is 0.27 nautical miles. Since it is often inconvenient to work on more than one chart, the chart used to illustrate longer boundaries would have to be at smaller scales, of say 1:1,000,000 or even 1:2,000,000. Even at these scales it might be necessary to use more than one chart. At a scale of 1:2,000,000, 1 centimetre would represent 2 kilometres or 1.08 nautical miles.

5. Once the straight baselines have been marked on the charts, the location of the boundary's turning points and termini can be added, and joined by a fine line. Since the finest line which most analysts would draw would have a width of 0.1 millimetre, that line would represent a zone 200 metres wide on a chart at a scale of 1:2,000,000. Once this work has been completed, it is then necessary to test each turning point and terminus with a pair of dividers to discover their relationships to the nearest point on both coasts.

6. In making such comparisons it is important to bear in mind that on charts drawn on Mercator projection the scale on any chart will vary, and will increase towards the poles. The changes in scale will be least on large scale charts near the equator and greatest on small scale charts near the poles. Most charts are drawn on Mercator's projection because constant courses on the sea appear as straight lines on the chart. Thus, when using medium scale charts on Mercator's projection, it is essential to ensure that the correct scale is used when measuring the distance from the boundary to the opposite shore. Quite often the scale will be different when measuring from a turning point on the boundary to the nearest points on the baselines, when these nearest points are not on the same parallel.

7. If after taking these steps with due care it is found that the turning points are equidistant, then the boundary is established as a median line.

8. However, even if the points are not found to be on a median line, it would be presumptuous to assume that equidistance played no role in their location, without considering the following problems.

9. First, it is quite possible that the boundaries were defined on very large scale charts, constructed specifically for that purpose. Such charts would not normally be available except to the two countries concerned. In addition they would have all the important points on the baselines marked according to the most recent surveys, verified by both countries. Such charts would certainly be more accurate than charts available to analysts which, in some parts of the world, are based on surveys made at least decades ago. The cost of bringing such charts to a better standard of accuracy has generally prevented any updating, particularly with respect to those coasts to which vessels give a wide berth, such as the West and South coast of Western Australia. Consequently an analyst must consider the possibility that the available charts do not have all the correct information about reefs, rocks and islets marked, or where such information is shown, it might be in the wrong position.

10. It is, however, fairly safe to assume that, if turning points and termini are identified by co-ordinates which include degrees, minutes and seconds, large scale accurate charts have been used, since 1 second represents about 30 metres. To produce such precise locations detailed surveys must be available.

11. Second, it is possible that a plotted boundary may appear to follow a course other than the equidistance line in some sections because the Parties have agreed to disregard some of the points on the baseline. Conversely, the Parties may have agreed to allow the use of a feature which would not normally be considered part of the baseline. For example, when the agreement between Australia and France was published, after being signed on 4 January 1982, it was easy to establish that the boundary was based on equidistance, except in one sector between points 18 and 19.[1] The solution to the problem concerning this sector was supplied during a lecture by an official of Australia's Foreign Affairs Department on 11 September 1983. He explained what had happened in the following terms:

> "One interesting aspect of the negotiations was that the French accepted the use of Middleton Reef as a relevant feature, even though this reef was only exposed at low tide. If Middleton Reef had not been taken into account a median line delimitation would lie further southwards. The French also accepted an Australian proposal that the median line be 'straightened' to improve the boundary from both practical and presentational viewpoints."[2]

This explanation shows that the role of equidistance in negotiating this sector of boundary was concealed first by using an unusual basepoint, not envisaged by any conventions on the law of the sea, and second by modifying the median line which this unusual basepoint has established.

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[1] See Annex of Delimitation Agreements No. 71.

[2] P. G. Bassett, 1983, "Delimitation of Australia's Maritime Boundaries", unpublished paper delivered at the Australian National University from 8 to 11 September 1983.

12. The role of equidistance may also be concealed when one or both States use unpublicised baselines. In analysing the continental shelf boundary between Indonesia and Malaysia, The Geographer of the United States Department of State referred to Malaysia's straight baselines, which were shown on a map. In fact Malaysia has never proclaimed any straight baselines, and the existence of these lines was only confirmed when Malaysia published a map of its territorial seas. The map was published in two sheets at a scale of 1:1,500,000.[1] On it the outer edge of Malaysia's territorial waters appeared as straight lines. Such limits could only have been derived from straight baselines, and these were found by drawing parallel lines 12 nautical miles landward of the edge of the territorial seas. The existence of such baselines was disguised by not showing any internal waters. This omission means that in some areas Malaysia is claiming territorial seas 59 nautical miles wide.

13. A third situation in which the role of equidistance may be difficult to detect is when some feature on the baseline has been given only a partial effect. The problem is more difficult when the States are in an adjacent coasts situation than when they are opposite one another. Though proportional discounting normally takes the form of giving only half-effect to some features, there is no reason why the proportion should not be one quarter or one third.

14. Another way in which the role of equidistance may be disguised is when some of the boundary points are equidistant from a third State. This situation occurs in the boundaries agreed between the United Kingdom and West Germany, between the United States and Venezuela, and between the Dominican Republic and Venezuela. In the first agreement the boundary is equidistant between the United Kingdom and Denmark and The Netherlands; in the other two agreements points on the line are equidistant between the United States and the Dominican Republic on the one hand, and The Netherlands Antilles on the other.

15. This analysis makes it clear that if a boundary agreement does not explain how the boundary was drawn, and if it proves impossible to elicit this information from the countries concerned, it is necessary to undertake detailed research to discover the part played by equidistance; but the difficulty is more often than not overcome.

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[1] Malaysia, Director of National Mapping 1979. *Map showing Territorial Waters and Continental Shelf Boundaries of Malaysia*, 2 sheets at a scale of 1:1,500,000.

## 2. The Libyan Analysis of Specific Boundary Agreements.

16. A careful examination has been carried out of the 71 maritime agreements analysed by Libya in its Annex of Delimitation Agreements submitted with its Counter-Memorial. Although it is claimed that the analysis is "detailed and factual,"[1] the examination carried out has shown that the Libyan analysis contain a number of errors, and that the cumulative effect of these errors is to seriously understate the significance of the use of equidistance in maritime boundary agreements.

17. The agreements were the analysis in the Libyan Counter-Memorial and its Annexes appear to be faulty will now be considered in detail, and in the order – i.e. the chronological order – listed and analysed by Libya. It remains only to be premised that Libya has omitted three delimitations; two concern France and Fiji and the third is between Indonesia and Papua New Guinea.

18. The faulty analysis refer to the following agreements:

### (i) *Iran-Saudi Arabia, Agreement No. 17.*

19. In referring to the boundary between Iran and Saudi Arabia, the following statement appears in the *Comments* on the agreement:

> "The boundary itself, however, has not otherwise been based on equidistance although in parts it does approximate the boundary that would result from a median line".

The analysis of The Geographer states that the eastern segment which measures 45 nautical miles "... is essentially an equidistant line between two mainlands".[2] This opinion can be confirmed by measurements of the distances involved.

### (2) *Iran-Qatar, Agreement No. 21.*

20. The analysis of the boundary contained in Libya's *Comments* on the agreement states that the "turning points ... suggest that the boundary is more or less equidistant". The analysis by The Geographer[3] shows that the boundary is *exactly* equidistant.

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[1] Libyan Counter-Memorial, p. 124, para. 5.63.

[2] *Limits in the Seas*, No. 24, p. 4.

[3] *Ibid.*, No. 25.

(3) *Mexico–U.S.A., Agreement No. 23.*

21. In commenting on the boundary agreement between the United States and Mexico, Libya cites from the U.S. Senate, Executive Report, No. 96–49, 5 August 1980, p. 24. According to this report the boundaries in the Gulf of Mexico and the Pacific Ocean can be characterized best "as a negotiated boundary reflecting the assessment of the treaty partners of their best interests". The Libyan *Comments* on the agreement also contain a quotation from the same report which refers to "tradeoffs" in the two areas whereby "a substantial area in the Pacific Ocean ... went to the United States and a somewhat small area in the deep waters of the East central Gulf of Mexico ... went to Mexico".

22. An uninformed reading of this analysis by Libya could lead to the conclusion that equidistance was unimportant in this agreement. In fact the reverse is true as the following quotation from a paper by Dr R. W. Smith (who is cited as an expert source by Libya[1]) demonstrates:

> "Mexico and the United States front on two common water bodies, the Pacific Ocean and the Gulf of Mexico. Technical experts from the two countries held informal consultations in New York City during April, 1976, prior to the enforcement of extended maritime zones by either country. At that time an informal agreement was reached to make recommendations to their respective Governments on numerous technical issues. The boundary would be based on and reference made to the 1927 North American Datum because it was the basis for working charts of both countries. *Equidistance was an appropriate method of delimitation in each of the boundary regions.* For practical purposes an attempt would be made to simplify the equidistant lines. Between April and November, 1976, the two countries carried out a technical exercise. Minor discrepancies that appeared in the calculations for the Gulf of Mexico were easily resolved by reference to large-scale coastal charts. On November 24, 1976, an exchange of notes in Mexico City effected an agreement on a provisional line".[2]

Smith goes on to explain that all the terminal points of the boundary in the Pacific Ocean and the two segments in the Gulf of Mexico are 200 nautical miles from the nearest land of both countries.

23. Inspection of the boundaries on medium scale charts clearly shows that the "tradeoffs" referred to earlier concern baseline points. The United States secured full effect for San Clemente Island in the Pacific Ocean, while Mexico secured full effect for the Whale Rock on the Alacran Reef in the Gulf of Mexico. There was no question of the two countries swopping areas which Mexico could claim in the Pacific Ocean and which the United States could claim in the Gulf of Mexico. Both boundaries in this agreement are very slight modifications of equidistance lines.

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[1] Annex of Delimitation Agreement, Introduction, p. 3, para. 1.

[2] R. W. Smith, 1981. "The Maritime Boundaries of the United States" *Geographical Review*, Vol. 71, p. 402. Emphasis supplied.

(4) *Bahrain–Iran, Agreement No. 25.*

24. The *Comments* on this agreement by Libya run as follows:

> "The analysis of The Geographer of the U.S. State Department states that two of the four turning points on the line 'were determined by existing continental shelf boundary agreements'. Thus the delimitation between Iran and Bahrain took place within a restricted geographic area with correspondingly short stretches of the coast on either side of the Gulf resulting in a relatively short overall delimitation line (approximately the same length as the relevant coasts of Bahrain and Iran)".

It appears that the author of this comment has been guilty of selective quoting, or a remarkable oversight. The full paragraph in the analysis by The Geographer reads as follows:

> "The Bahrain–Iran continental shelf boundary is not based solely on the equidistance principle. Points 1 and 4 were determined by existing continental shelf boundary agreements; the remaining two points are nearly the same distance from Bahrain and Iran, so the assumption can be made that Points 2 and 3 are in fact equidistant points. The continental shelf boundary agreement does not specify that the principle of equidistance was utilized, but rather that the boundary divides the shelf in a 'just, equitable and precise manner'".[1]

The same points are made in similar language in the Summary contained in the analysis by The Geographer.[2]

(5) *United Kingdom–West Germany, Agreement No. 27.*

25. The Libyan *Comments* on this agreement state that:

> "Although the basis on which the delimitation is established is not specified in the Agreement, the boundary line is not equidistant between the nearest points on the territories of the two parties. The three turning points fall some 20 nautical miles closer to Britain than to Germany".

That statement is true, but the situation could not be otherwise after this agreement became necessary following the 1969 judgment of the Court in the *North Sea* cases. However an objective analysis would surely point out that all three points which define this boundary lie on one of the equidistant boundaries which the United Kingdom negotiated with The Netherlands in October 1965, and with Denmark in March, 1966. Indeed, Point 2 on the Anglo-German boundary occupies the same position as Point 19 on the original Anglo-Dutch boundary.

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[1] *Limits in the Seas*, No. 58, p. 3.

[2] *Ibid.*, p. 5.

(6) *India-Sri Lanka, Agreement No. 38.*

26. The Libyan *Comments* on this agreement also seem to underplay the role of equidistance, as may be seen from a comparison between those *Comments* and the analysis by The Geographer.

27. The Libyan *Comments* contain the following passages:

> "The initial boundary line appears to divide the maritime areas within the Palk Bay in more or less equal portions. Since the relevant coasts of the parties are comparable in length, the delimitation appears to have resulted in a boundary proportionate to the length of the coasts involved . . . .
>
> The second agreement makes no reference to equidistance or any other method employed to establish the maritime boundary. It appears, however, that the line approximates an equidistant line, a fact which is not surprising given the similar lengths and configurations of the coasts of the two States in the delimitation area and the absence of any marked geomorphological relief in between".

In comparison, one cannot fail to note the objectivity of The Geographer's comments:

> "The (first) delimitation reflects a selective, i.e. modified, application of the principle of equidistance".[1]
>
> "The information in Table 1 (this table records the distance of turning points from the nearest coasts) indicates that the States apparently have agreed (in their second agreement) to a modified equidistant line and/or to one created by a selective choice of relevant base points".[2]

This last quotation deals with the segment of boundary in the Gulf of Manaar. The second agreement also extended the boundary drawn originally in Palk Bay, into the Bay of Bengal. About this sector The Geographer made the following comment:

> "The two countries have apparently agreed upon a modified equidistant line similar to the Gulf of Manaar delimitation".[3]

In passing it might be noted that in this analysis The Geographer refers to another technical issue which sometimes makes it difficult to detect whether a point is equidistant:[4]

> "The terminal point 6 is calculated to be 197.86 miles from India and 198.95 miles from Sri Lanka. The intent was to continue the boundary to 200 miles from each coast; the discrepancy may be partially explained by use of different spheroids in the distance calculations".

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[1] *Limits in the Seas*, No. 66, p. 6.

[2] *Ibid.*, No. 77, p. 7.

[3] *Ibid.*, p. 8.

[4] *Ibid.*

### (7) *Iran-Oman, Agreement No. 40.*

28. The Libyan *Comments* on this agreement contain the following statement:

> "The Agreement does not indicate the method of delimitation, although the Preamble indicates the parties' desire to reach an 'equitable' boundary. The final 5 or 6 points on the line may be seen to deviate sharply from equidistance".

Measurements show that the maximum deviation from a median position for any of the final six points is 0.3 nautical miles, or 555 metres. The Libyan comment just quoted is a curious way of admitting that the first sixteen points occupy equidistant positions.

### (8) *Cuba-Haiti, Agreement No. 52.*

29. The Libyan *Comments* on this agreement report that the agreement made reference to equidistance and equity in the Preamble, that the delimitation took place in a confined area and that the boundary is about the same length as the coasts which face each other.

30. Suspicions about the nature of this boundary should have been aroused by the fact that fifty-one points are used to define a boundary 150 nautical miles long, and that the coordinates are measured to two decimal places of seconds. These two facts point to very careful surveys and the use of equidistant points. When the points are plotted on a chart they are found to be equidistant, and the termini lie within 2 nautical miles of the trijunctions that are equidistant from the Bahamas in the North and Jamaica in the South.

31. It is interesting to note – in view of Libyan comments about the limited promontory of Norway's coasts which is involved in delimiting the boundary with the Faroes, that only small sections of Haiti's coast, around Cap du Mole St Nicolas and Cap Dame Marie, are involved in fixing the median line with the much longer coast of Cuba.

### (9) *Cuba–U.S.A., Agreement No. 53.*

32. In the *Comments* on this agreement, Libya quotes the American Deputy Legal Adviser as saying that though "the line established by the treaty [is] close to being an equidistance line giving full effect to islands – [it] is in fact a boundary every point of which has been established by negotiation".

33. A fuller explanation, giving a clearer view of the importance given to equidistance, has been given by Dr R. W. Smith (who has already been quoted in this Opinion). After explaining that the United States objected to some sections of Cuba's straight baselines, Smith describes the procedure followed in order to solve the problem:

> "During the technical discussions, comparable artificial construction lines were drawn along the southern Florida coastline. An

equidistant line was then calculated by the use of the Cuban straight baselines and the artificial construction lines of the United States. Another equidistant line was calculated by the use of the relevant basepoints on the low-water line of the coasts of the two countries. A third line was then created between those two lines, which was not an equidistant line, but which divided equally the area between them".[1]

(10) *U.S.A.–Venezuela, Agreement No. 56.*

34. The *Comments* by Libya on this agreement do not even mention the word "equidistance". The closest the commentary comes to admitting that this is a boundary primarily based on equidistance is a quotation from an article by M. S. Fieldman and D. Colson that Aves Island, belonging to Venezuela, was given full effect. Of course, if an island is given full effect it must produce an equidistant line, and Aves Island is the only fragment of Venezuelan territory involved in determining the boundary between Points 1 and 11. Point 11 is equidistant from Aves Island and El Roque, which belong to Venezuela, and Muertes Island, which belongs to the United States. From Point 11 the boundary follows a westward course and Point 22 is very close to the trijunction which is equidistant from Mona Island, which belongs to the United States, Isla Saona, belonging to the Dominican Republic, and Bonaire, belonging to The Netherlands.

(11) *The Netherlands–Venezuela, Agreement No. 57.*

35. The *Comments* by Libya on the boundaries settled by this agreement merely indicate that the sector separating Aruba, Curacao and Bonaire from the Venezuelan mainland is an equidistant line. The shorter boundary between Saba and San Eustaquio, belonging to The Netherlands and Aves Island, belonging to Venezuela, is, however, also a median line. Furthermore, Points 1 and 13, which are the termini of the boundary limiting the Dutch claims from Aruba, Curacao, and Bonaire, are equidistant between the Dominican Republic and those islands of the Netherland Antilles. This is a case where Venezuela has apparently benefited by being allowed to use the territory of a third state (the Dominican Republic) as basepoints.

(12) *India–Thailand, Agreement No. 59.*

36. The *Comments* on this boundary agreement in the Andaman Sea contain the following assertion:

> "The line is not, however, based on equidistance since in places it falls some 25–30 nautical miles closer to Indian territory than to Thai".

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[1] *Op. Cit.*, Vol. 71, p. 402.

This assertion is contradicted by the fact that Points 4, 5, 6 and 7 are either equidistant or so close to being equidistant that only careful survey or the use of very large scale charts could establish the matter with absolute certainty. The Geographer only refers to points on the line connecting Points 4, 5 and 6 as being "nearly equidistant to the respective baselines".[1] But it is evident that the distances from Point 7 have not been accurately measured on the chart provided. Point 7 in Table 2 in the report by The Geographer, is shown to be 126.8 nautical miles from India and 121 nautical miles from Thailand. One of these figures, and probably the second, must be a misprint since measurements on the chart which accompanies the report shows the two distances to be identical. This segment of equidistance line totals 63.3 nautical miles. The divergence of 28.6 nautical miles from the median position occurs at the trijunction with Indonesia. It is incorrect to dismiss any role for equidistance on the basis of three out of seven points, especially when the four equidistant points define more than two thirds of the boundary.

(13) *Australia-Papua New Guinea, Agreement No. 60.*

37. The Libyan *Comments* on the agreement between Australia and Papua New Guinea in Torres Strait are simply that there is no mention of equidistance in the agreement and that the presence of islands makes it difficult to determine what effect they had on delimitation.

38. When turning points near the termini are examined on large scale charts it is evident that they are based on equidistance. Point (a), which is identical with Point A3 on the boundary agreed between Australia and Indonesia on 18 May 1971, is equidistant between the coasts of Indonesia and Australia. This is another case where a State, in this case Papua New Guinea, benefits from a basepoint on the coast of a third State, in this case Indonesia. Points (b) and (c) of the agreement between Australia and Papua New Guinea are equidistant between the two mainlands; islands are discounted. It is true, however, that once Torres Strait is approached – but only then – it becomes impossible, because of the multitude of islands, to guess which basepoints might have been used.

(14) *Dominican Republic–Venezuela, Agreement No. 61.*

39. On this agreement the Libyan *Comments* have this to say:

> "The Dominican Republic–Venezuela Agreement specifically states that delimitation has been based on equitable principles. No mention is made of equidistance. The eastern sector (sector A) of the boundary line appears to fall closer to the Dominican Republic than to Venezuela".

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[1] *Limits in the Seas*, No. 93, p. 5.

Reference to the map produced by Libya which follows this comment makes it clear that Sector A is the western, not the eastern sector. But apart from this evident oversight, there is an explanation why parts of the western sector and all the eastern sector are closer to the Dominican Republic than Venezuela, and this is the presence of The Netherlands Antilles off the coast of Venezuela. In fact most of the turning points on the Dominican Republic–Venezuela boundary are equidistant between Punta Beata, or Alta Vela, or Isla Saona belonging to the Dominican Republic and the islands of The Netherlands Antilles. The only Venezuelan territory which is involved in producing this boundary line of equidistance is the northern tip of Los Monjes Archipelago. Points 5 and 6 are equidistant from this feature and Alta Vela.

(15) *Costa Rica–Panama, Agreement No. 64.*

40. On this agreement, the *Comments* by Libya note, quite correctly, that although the agreement states that the Parties employed the median line "... strict equidistance was not adhered to". The Libyan *Comments*, however, also acknowledge that both boundaries (in the Caribbean Sea and in the Pacific Ocean) may be considered to be lines perpendicular to the coast. This is a perfectly, proper application of equidistance. It is a simple technique by which States achieve a boundary which is simple to define and administer, by agreeing on a set of artificial basepoints.

41. One other point should be made. As Libya itself pointed out in respect of the boundary between Venezuela and the United States[1] "... it is not always apparent from an agreement itself what considerations have gone into the negotiation of a boundary line". In the case under review one notes that in Article III of the agreement Costa Rica recognizes Panama's claim to the Gran Golfo de Panama as a historic bay, and such recognition may have affected the direction of the perpendicular line.

(16) *France–Australia, Agreement No. 71.*

42. In its *Comments* on this agreement, Libya gives only grudging acknowledgement that the lines are equidistant. The boundary between Heard and McDonald Islands, belonging to Australia, and Kerguelen Islands, belonging to France, is an equidistant line. The boundary through the Coral Sea is also an equidistant line giving full effect to the tiny atolls owned by each country. As pointed out earlier,[2] the long section facing Points 18 and 19 was a modified equidistant line using Middleton Reef as an Australian basepoint.

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[1] See Libya's *Comments* on Agreement No. 56.

[2] In para. 11 above.

### 3. THE ROLE OF EQUIDISTANCE IN MARITIME BOUNDARY AGREEMENTS SINCE 1969

43. Libya's position on this question is revealed in two assertions contained in its Counter-Memorial. These are:

> "At the present juncture it is intended to show how, contemporaneously with the rejection of equidistance as a mandatory rule by the Courts (and also by the Third Conference on the Law of the Sea), the reliance on equidistance began to decline in agreements of delimitation between States".[1]
>
> "If a broad conclusion has to be framed as to the trend of delimitation agreements, then it would be that the equidistance method was never adopted as an obligatory method, that particularly after the Court's 1969 Judgment the incidence of its use declined, and this trend was accentuated in the newer move towards maritime boundaries".[2]

44. The evidence of this view is contained in the second volume of the Counter-Memorial entitled Annex of Delimitation Agreements. In order to test the proposition that reliance on equidistance has declined since 1969 the following steps were taken. First, all 71 agreements listed and analysed in the Annex just referred to were examined to see whether they involved any use of the equidistance method. For reasons given in the Counter-Memorial of Libya, namely that it "did not involve agreement on a boundary"[3] but rather the establishment of a Common Zone, the agreement between Saudi Arabia and Sudan was discarded. It is to be noted, however, that the narrow joint zone which Saudi Arabia and Sudan created between the 1,000 metres isobaths contains the location of the median line which would separate claims from those two countries.

45. Another agreement – that between Mauritania and Morocco – was also not taken into account in view of the fact that Mauritania withdrew its claim to the southern portion of the former Spanish Sahara, according to the terms of the agreement of Algiers reached with the Popular Front for the Liberation of Saguia il Hamra and Rio de Oro on 5 August 1979.[4]

46. On the other hand three other delimitations – not included in the Libyan list – were added. Two concern France and Fiji and the third was between Indonesia and Papua New Guinea.

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[1] Libyan Counter-Memorial p. 104, para. 5.11.

[2] *Ibid.*, p. 110, para. 5.27.

[3] At p. 107, para. 5.18.

[4] *Africa Research Bulletin* 1979, Vol. 16, No. 8, p. 5379.

47. No agreement dealing with the territorial sea was included since these are expressly excluded by the Libyan Counter-Memorial.[1] On this ground, the boundary agreement between the Federal Republic of Germany and the German Democratic Republic[2] should not have been included in the Libyan list. In fact although it is not specifically called a territorial sea boundary, that is clearly the purpose it serves, as Libya itself accepts.[3] The seaward terminus is only 5.5 nautical miles from the most distant coast and Article 3 of the agreement states that the boundary is to be marked on charts pursuant to the Convention on the Territorial Sea and Contiguous Zone. No account has therefore been taken of this delimitation.

48. The second step involved classifying each boundary according to whether it separated adjacent or opposite States. The term "boundary" is used here as denoting a distinct boundary even if more than one such distinct boundary may have been delimited in the same agreement. Thus the agreement between Indonesia and Malaysia in 1969 defined three distinct boundaries: two were defined in accordance with equidistance, while the third followed some course other than the median line. Each of these three boundaries, therefore, is dealt with separately. However, where two States simply extend an existing boundary, as India and Sri Lanka did on 23 March 1976, only one boundary is recorded.

49. It is recognized that there may be differences of opinion as to whether a particular boundary should be classified as one which separates opposite States or one which separates adjacent States. However the classification may be relevant and it has for that purpose been carried out. With this in mind, this task has been performed in the least exceptionable manner.

50. Within each major class of adjacent or opposite States, the boundaries were then subdivided into two further subdivisions according to whether they relied on equidistance or not. Finally these subdivisions were distinguished into agreements entered into before the end of 1969 or after.

51. The results of this tabulation are as follows:

| | BOUNDARIES BETWEEN OPPOSITE STATES | | BOUNDARIES BETWEEN ADJACENT STATES | |
|---|---|---|---|---|
| | *Equidistant* (*Table 1*) | *Other* (*Table 2*) | *Equidistant* (*Table 3*) | *Other* (*Table 4*) |
| Pre-1970 | 10 | 1 | 9 | 5 |
| Post-1969 | 34 | 5 | 11 | 4 |

52. This table shows that before 1970 the proportion of boundaries which relied on equidistance was 76%. In the period since 1969, 83% of boundaries defined by agreement have relied on equidistance.[4]

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[1] See Annex of Delimitation Agreements, p. 1, para. 1.

[2] Agreement No. 39.

[3] *Ibid., Comments.*

[4] The agreements on which the table has been worked out are set out, in their appropriate classification, in Tables 1, 2, 3 and 4 attached to this Opinion.

53. The only conclusion that can be drawn from the facts given above is that equidistance played an important role both before and after 1969, and that since that date the incidence of equidistant boundaries has, if anything, increased.

## 4. THE RÔLE OF PHYSICAL FEATURES AND OF DIFFERENT COASTAL LENGTHS IN MARITIME BOUNDARY AGREEMENTS

54. Libya attaches great importance to two assertions of a physical character. The first is that there is between the two countries an area which Libya calls a "Rift Zone"; and the second is that the relevant Libyan coastline is about nine times longer than that of Malta.

55. An examination has therefore been carried out of all known boundary agreements in order to discover whether similar considerations as those advanced by Libya have played an important rôle in the delimitation of the boundary established by agreement between States.

56. This examination has revealed that, even in those agreements were no element of equidistance can be detected, there is only one agreement which was significantly affected by considerations of a marked disruption or discontinuity of the seabed. The agreement is that between Australia and Indonesia signed on 3 October 1972, and the physical feature in question is the Timor Trough or Trench which lies between Australia and the Indonesian Island of Timor. According to Libyan sources[1] this Trough "is more than 550 nautical miles long and an average of 40 miles wide, and the sea-bed slopes down on opposite sides to a depth of over 10,000 feet".

57. The boundary between these two States is still only partly settled. At the time the settlements took place (Agreements of 18 May 1971, 9 October 1972 and 26 January 1973) the eastern part of the Island of Timor belonged to Portugal and the discussions were therefore restricted to the areas west and east of this Portuguese territory. Now that Indonesia has assumed control of Portuguese Timor it has become necessary for Indonesia and Australia to close their seabed boundary across what has become known as the "Timor Gap" and Indonesia is understood to be pressing to complete the boundary by means of a median line. In "The Age", a Melbourne newspaper, of 31 March 1984, some comments by Dr. Mochtar, the Indonesian Foreign Minister, were reported. He is quoted as saying that the Australian position was based on the 1958 Convention on the Continental Shelf (presumably the depth and exploitability principles) while Indonesia based its position on the 1982 Convention on the Law of the Sea (presumably the distance principle).

58. With respect to the second question viz. whether a marked difference in the lengths of the coastlines of the countries involved appeared to be a factor in delimiting maritime boundaries, an examination of the boundary agreements reveals that, here too, there is only

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[1] Libyan Memorial, p. 100 note 1.

one example where the relative lengths of the coastlines is believed to have played a part.

59. The two countries are France and Spain and the area involved is the Bay of Biscay. The evidence that part of the dividing line established by the agreement of 29 January 1974 is based on "the ratio of the artificial coastlines of the two States" is provided by The Geographer.[1] The agreement itself only specifies the basis on which the first part of the dividing line was defined namely that the line "is, in principle, the line whose points are all equidistant from the French and Spanish baselines".[2]

60. Conversely, the examination of the boundaries established by agreement has revealed that there are a number of cases in which significant depressions in the seabed have apparently been ignored when boundaries were delimited in their vicinity.

61. These cases, and the relevant data concerning them, may be summarized as follows: –

| *Countries* | *Date of Agreement* | *Name of Feature* | *Depth of Sea* |
|---|---|---|---|
| (a) Norway–UK | 10. 3.1963 | Norwegian Trough | 400 metres |
| (b) Norway–Denmark | 8.12.1965 | Norwegian Trough | 700 " |
| (c) Cuba–Mexico | 26. 7.1976 | Campeche Escarpment and Yucatan Channel | 3000 " |
| (d) Cuba–Haiti | 27.10.1977 | Cayman Trough | 2900 " |
| (e) Colombia–Dominican Republic | 11. 1.1978 | Aruba Gap | 4600 " |
| (f) Dominican Republic–Venezuela | 3. 3.1979 | Aruba Gap | 4600 " |

62. With respect to these cases the following additional points may be made.

(a) The Anglo–Norwegian Agreement signed on 10 March 1965 produced an equidistant boundary. Although the Libyan Counter-Memorial states that "It is unclear whether the presence of the Norwegian Trough was taken into account during the discussions concerning the delimitation line",[3] it is perfectly clear that any consideration of this feature had no significance to the final outcome.

(b) Even though the Norwegian Trough reaches its greatest depth between Denmark and Norway, it had no effect on the final delimitation of the boundary, which is a median line established by agreement on 8 December 1965.

(c) On 26 July 1976 Cuba and Mexico delimited an equidistant boundary which separated their exclusive economic zones and continental shelves. The agreed line is a median line, ignoring completely the physical features of the area. Thus the northern part of this boundary cuts across the well defined geological and structural grain of the seabed. The agreed line also cuts across the Banco de Campeche (the broad submerged margins lying off the north coast of Mexico's Yucatan Peninsula) just south of the terminus of the Campeche Escarpment, and allocates to Cuba two areas of the continental slope which mark the edge of the continental margin surrounding the Yucatan peninsula. These two areas are separated by the Catoche Tongue, which is the largest submarine valley cut into the northeast part of the Banco de Campeche.

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[1] *Limits in the Seas* No. 83, pp. 13–14.

[2] For Agreement See Libyan Counter-Memorial, Vol. 11 Part I, Agreement No. 34.

[3] *Ibid.*, Agreement No. 8.

(d) The boundary agreed between Cuba and Haiti – which is also an equidistant boundary – cuts across another significant depression: the Cayman Trough. This feature has been described by Uchupi in the following terms:

> "Cayman Trough is a structural low 1700 km long and over 100 km wide extending from the Gulf of Honduras to the Gulf of Gonave in Hispaniola (Banks and Richards, 1969). Its seismicity and rugged topography make this depression one of the major tectonic units of the Carribean".[1]

(e) The Dominican Republic signed boundary Agreements with Colombia on 11 January 1978 and with Venenzuela on 3 March 1979. The equidistant boundaries which resulted are unrelated to the Aruba Gap which is the deep water connection between the Colombia and Venezuela Basins.[2] These two basins are separated by the Beata Ridge which extends southwards for 210 nautical miles from Punta Beata on the South coast of the Dominican Republic. This ridge is a complex faulted horst which is tilted to the east and inclined to the south.

(f) The effect of these last two boundaries is to place the southern parts of the Beata Ridge, which is geologically, structurally and geomorphologically part of the Dominican Republic, within the national maritime zones of Colombia and Venezuela.

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[1] Uchupi, E., 1975 "Physiography of the Gulf of Mexico and the Caribbean Sea", in *The Gulf of Mexico and the Caribbean. The Ocean Basins and Margins*, Vol. 3, edited by A. E. M. Nairn and F. G. Stehli, New York, p. 44.

[2] *Ibid.*, p. 37.

## TABLE 1

Agreements, which have relied on equidistance, concluded between States with coasts that are mainly opposite.

| *States* | *Date*[1] | |
|---|---|---|
| Bahrain–Saudi Arabia | 22. 2.1958 | (26. 2.1958) |
| Norway–United Kingdom | 10. 3.1965 | (29. 6.1965) |
| Protocol[2] | 22.12.1978 | |
| Netherlands–United Kingdom | 6.10.1971 | (23.12.1966) |
| Protocol[3] | 25.11.1971 | ( 7.12.1972) |
| Denmark–Norway | 8.12.1965 | ( 3. 6.1980) |
| Protocol[4] | 24. 4.1968 | (24. 4.1968) |
| Denmark–United Kingdom | 3. 3.1966 | ( 6. 3.1967) |
| Protocol[5] | 25.11.1971 | ( 7.12.1972) |
| Italy–Yugoslavia | 9. 1.1968 | (21. 1.1970) |
| Iran–Saudi Arabia | 24.10.1968 | (21. 9.1969) |
| Iran–Qatar | 20. 9.1969 | (10. 5.1970) |
| Indonesia–Malaysia[6] | 27.10.1969 | (17.11.1969) |
| Australia–Indonesia | 18. 5.1971 | ( 8.11.1973) |
| Bahrain–Iran | 17. 6.1971 | (14. 5.1972) |
| Italy–Tunisia | 20. 8.1971 | ( 9.12.1978) |
| United Kingdom–West Germany | 25.11.1971 | ( 7.12.1972) |
| Indonesia–Thailand | 17.12.1971 | (16. 7.1973) |
| Canada–Denmark | 17.12.1973 | (13. 3.1974) |
| Japan–Korea[7] | 5. 2.1974 | (22. 6.1978) |
| Italy–Spain | 19. 2.1974 | (16.11.1978) |
| India–Sri Lanka | 26. 6.1974 | ( 8. 7.1974) |
| Extension[8] | 23. 3.1976 | (10. 5.1976) |
| Iran–Oman | 25. 7.1974 | (28. 5.1975) |
| India–Indonesia | 8. 8.1974 | (17.12.1974) |
| Cuba–Mexico | 26. 7.1976 | (26. 7.1976) |
| India–Maldives | 28.12.1976 | |
| Greece–Italy | 24. 5.1977 | (12.11.1980) |
| Colombia–Dominican Republic | 13. 1.1978 | |
| Colombia–Haiti | 17. 3.1978 | (24.11.1980) |
| Netherlands–Venezuela[9] | 31. 3.1978 | |
| India–Thailand | 22. 6.1978 | (15.12.1978) |
| Australia–Papua New Guinea | 18.12.1978 | |
| Dominican Republic–Venezuela | 3. 3.1979 | |
| Denmark–Norway | 15. 6.1979 | ( 3. 6.1980) |
| France–Tonga | 11. 1.1980 | (11. 1.1980) |
| France–Mauritius | 2. 4.1980 | ( 2. 4.1980) |
| New Zealand–United States (Cook Islands) | 11. 6.1980 | |
| New Zealand–United States (Tokelau) | 2.12.1980 | |
| France–St. Lucia | 4. 3.1981 | ( 4. 3.1981) |
| Australia–France[10] | 4. 1.1982 | (10. 1.1983) |
| Fiji–France[11] | 19. 1.1983 | |

*Footnotes overleaf*

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[1] The first date is the date when the agreement was signed; the second is the date when the agreement came into force.

[2] The original boundary was extended.

[3] The original boundary was amended following the 1969 judgment in the *North Sea* cases.

[4] One point in the original agreement was altered.

[5] The original boundary was amended following the 1969 judgment in the *North Sea* cases.

[6] This agreement contains two equidistant boundaries. The third, which is not equidistant, is listed in Table 4.

[7] This agreement defined a boundary and a joint development zone.

[8] The original boundary was extended.

[9] This agreement contains two equidistant boundaries.

[10] This agreement contains two equidistant boundaries.

[11] This agreement contains two equidistant boundaries.

## TABLE 2

Agreements, which have not relied on equidistance, concluded between States with coasts that are mainly opposite.

| *Countries* | *Date*[1] | |
|---|---|---|
| Trinidad-Venezuela | 26. 2.1942 | (22. 9.1942) |
| Australia-Indonesia | 8.10.1972 | ( 8.11.1973) |
| Dubai-Iran | 21. 8.1974 | |
| Colombia-Costa Rica | 17. 3.1977 | |
| France-Venezuela | 17. 7.1980 | (28. 1.1983) |
| Iceland-Norway | 22.10.1981 | ( 2. 6.1982) |

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[1] The first date is the date the agreement was signed; the second is the date it came into force.

## TABLE 3

Agreements, which have relied on equidistance, concluded between States with coasts that are mainly adjacent.

| *Countries* | *Date*[1] | |
|---|---|---|
| Norway–Soviet Union | 15.12.1957 | (24. 4.1957) |
| Netherlands–West Germany | 1.12.1964 | (18. 9.1965) |
| Extension[2] | 28. 1.1971 | ( 7.12.1972) |
| Finland–Soviet Union | 20. 5.1965 | (25. 5.1966) |
| Extension[3] | 5. 5.1967 | (15. 3.1968) |
| Denmark–West Germany | 9. 6.1965 | (27. 5.1966) |
| Extension[2] | 28. 1.1971 | ( 7.12.1972) |
| Norway–Sweden | 24. 7.1968 | (18. 3.1969) |
| East Germany–Poland | 28.10.1968 | (16. 4.1969) |
| Poland–Soviet Union | 28. 8.1969 | (13. 5.1970) |
| Mexico–United States[4] | 23.11.1970 | (18. 4.1972) |
| Indonesia–Papua New Guinea[5] | 18. 5.1971 | (18.11.1973) |
| Extension[6] | 12. 2.1973 | (26.11.1974) |
| Extension[7] | 9. 9.1982 | |
| Brazil–Uruguay | 21. 7.1972 | (12. 6.1975) |
| Finland–Sweden | 29. 9.1972 | (15. 1.1973) |
| Argentina–Uruguay | 19.11.1973 | (12. 2.1974) |
| France–Spain | 29. 1.1974 | ( 5. 4.1975) |
| Kenya–Tanzania | 17.12.1975 | ( 9. 7.1976) |
| Colombia–Panama | 20.11.1976 | (30.11.1977) |
| Costa Rica–Panama | 2. 2.1980 | (11. 2.1982) |

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[1] The first date is the date the agreement was signed; the second is the date it came into force.

[2] This extension was made following the 1969 Judgment in the *North Sea* cases.

[3] The original boundary was extended.

[4] The agreement defined two distinct boundaries: one in the Gulf of Mexico, the other in the Pacific Ocean. These boundaries were extended by an agreement signed on 4.5.1978, but the Senate of the United States has not ratified it.

[5] This agreement was entered into by Australia on behalf of Papua New Guinea. The boundary south of the island called New Guinea has been included as part of the Australia–Indonesia boundary listed in Table 1. This agreement also drew a short segment of boundary north of the island called New Guinea, and this boundary only is included in this Table.

[6] This agreement defined the land boundary between Papua New Guinea and Indonesia, and it included a short extension of the sea boundary agreed south of the island called New Guinea.

[7] This agreement extended the existing boundary north of the island called New Guinea.

## TABLE 4

Agreements, which did not rely on equidistance, concluded between States with coasts that are mainly adjacent.

| *Countries* | *Date*[1] | |
|---|---|---|
| Ecuador–Peru | 18. 8.1952 | ( 6. 5.1955) |
| Chile–Peru | 18. 8.1952 | ( 6. 5.1955) |
| Guinea Bissau–Senegal | 26. 4.1960 | (26. 4.1960) |
| Qatar–Abu Dhabi | 20. 3.1969 | (20. 3.1969) |
| Indonesia–Malaysia[2] | 27. 4.1969 | ( 7.11.1969) |
| Malaysia–Thailand | 21.12.1971 | (16. 7.1979) |
| Gambia–Senegal[3] | 4. 6.1975 | (27. 8.1976) |
| Colombia–Ecuador | 23. 8.1975 | (22.12.1975) |

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[1] The first date is the date the agreement was signed; the second is the date it came into force.

[2] This is the boundary which commences on the north shore of the island called Borneo. The other two boundaries defined by this agreement are listed in Table 1.

[3] There are two boundaries defined by this agreement.

# CERTIFICATION

I, the undersigned, EDGAR MIZZI, Agent of the Republic of Malta, hereby certify that the copies of the documents attached as Annexes 1, 2 and 3 of the Reply submitted by the Republic of Malta are accurate copies of the documents they purport to reproduce.

This 12th day of July, 1984.

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Edgar Mizzi
Agent of the Republic
of Malta.

# ORAL ARGUMENTS

## MINUTES OF THE PUBLIC SITTINGS

*held at the Peace Palace, The Hague,*
*from 26 November to 3 December 1984,*
*President Elias presiding*

# PLAIDOIRIES

## PROCÈS-VERBAUX DES AUDIENCES PUBLIQUES

*tenues au Palais de la Paix, à La Haye,*
*du 26 novembre au 3 décembre 1984,*
*sous la présidence de M. Elias*

## LIST OF ABBREVIATIONS USED IN THE ORAL ARGUMENTS

| | |
|---|---|
| LM | Memorial of the Libyan Arab Jamahiriya |
| MM | Memorial of Malta |
| LCM | Counter-Memorial of the Libyan Arab Jamahiriya |
| MCM | Counter-Memorial of Malta |
| LR | Reply of the Libyan Arab Jamahiriya |
| MR | Reply of Malta |

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## LISTE DES ABRÉVIATIONS UTILISÉES DANS LES PLAIDOIRIES

| | |
|---|---|
| ML | Mémoire de la Jamahiriya arabe libyenne |
| MM | Mémoire de Malte |
| CML | Contre-mémoire de la Jamahiriya arabe libyenne |
| CMM | Contre-mémoire de Malte |
| RL | Réplique de la Jamahiriya arabe libyenne |
| RM | Réplique de Malte |

## NINTH PUBLIC SITTING (26 XI 84, 3 p.m.)

*Present: President* ELIAS; *Vice-President* SETTE-CAMARA; *Judges* LACHS, MOROZOV, NAGENDRA SINGH, RUDA, MOSLER, ODA, AGO, EL-KHANI, SCHWEBEL, JENNINGS, DE LACHARRIÈRE, MBAYE, BEDJAOUI, *Judges* ad hoc JIMÉNEZ DE ARÉCHAGA, VALTICOS; *Registrar* TORRES BERNÁRDEZ.

*Also present:*

*For the Government of the Socialist People's Libyan Arab Jamahiriya:*

Mr. Abdelrazeg El-Murtadi Suleiman, Professor of International Law at the University of Garyounis, Benghazi, *as Agent*;

Mr. Youssef Omar Kherbish, Counsellor at the Secretariat of Justice,

Mr. Ibrahim Abdul Aziz Omar, Counsellor at the People's Bureau for Foreign Liaison, *as Counsel*;

Mr. Derek W. Bowett, C.B.E., Q.C., LL.D., F.B.A., Whewell Professor of International Law at the University of Cambridge,

Mr. Herbert W. Briggs, Goldwin Smith Professor of International Law [illegible]eritus, Cornell University,

Mr. Claude-Albert Colliard, Honorary Dean, Professor of International Law emeritus at the University of Paris I,

Mr. Keith Highet, Member of the New York and District of Columbia Bars,

Mr. Günther Jaenicke, Professor of International Law at the University of Frankfurt-am-Main,

Mr. Laurent Lucchini, Professor of International Law at the University of Paris I,

Mr. Jean-Pierre Quéneudec, Professor of International Law at the University of Paris I,

Mr. Walter D. Sohier, Member of the New York and District of Columbia Bars,

Sir Francis A. Vallat, G.B.E., K.C.M.G., Q.C., Professor emeritus of International Law at the University of London, *as Counsel and Advocates*;

Mr. Mohammed Alawar, Assistant Professor of Geography, Al-Fateh University, Tripoli,

Mr. Scott B. Edmonds, Instructor of Cartography and Director of Cartographic Services at the University of Maryland, Baltimore County,

Mr. Icilio Finetti, Professor of Geodesy and Geophysics at the University of Trieste,

Mr. Omar Hammuda, Professor of Geology, Al-Fateh University, Tripoli,

Mr. Derk Jongsma, Senior Lecturer in Geology at the Vrije Universiteit, Amsterdam,

Mr. Amin A. Missallati, Professor of Geology, Al-Fateh University, Tripoli,

Mr. Muftah Smeida, Second Secretary, People's Bureau for Foreign Liaison,

Mr. Mohamed A. Syala, Surveying Department, Secretariat of Planning, Tripoli,

Ms Victoria J. Taylor, Cartographer at the University of Maryland, Baltimore County, Mr. Jan E. van Hinte, Professor of Paleontology at the Vrije Universiteit, Amsterdam, *as Advisers*;

Mr. Rodman R. Bundy, Member of the New York Bar,
Mr. Richard Meese, Docteur en droit,
Mr. Henri-Xavier Ortoli, Member of the New York Bar, *as Counsel*;

*For the Government of Malta:*

H.E. Mr. Edgar Mizzi, Ambassador, *as Agent and Counsel*;

Mr. Ian Brownlie, Q.C., F.B.A, Chichele Professor of Public International Law, University of Oxford; Fellow of All Souls College, Oxford,
Mr. Elihu Lauterpacht, Q.C., Director of the Research Centre for International Law and Reader in International Law, University of Cambridge,
Mr. Prosper Weil, Professor at the University of Law, Economics and Social Sciences, Paris, *as Counsel*;

Commander Peter B. Beazley, O.B.E., F.R.I.C.S., R.N. (Retd.), Hydrographic Surveyor,
Mr. Georges H. Mascle, Professor of Geology, Dolmieu Institute of Geology and Mineralogy, University of Grenoble,
Mr. Carlo Morelli, Full Professor of Applied Geophysics, University of Trieste (from morning sitting of 4 February 1985 (**IV**)),
Mr. J. R. V. Prescott, Reader in Geography, University of Melbourne,
Mr. Jean-René Vanney, Department of Dynamic Geology, Pierre et Marie Curie University, and Department of Teaching and Research, Sorbonne University, Paris, *as Scientific and Technical Advisers*;

*Assisted by:*

Mr. Roger Scotto, Assistant Secretary, Oil Division, Office of the Prime Minister, Malta,
Mr. Saviour Scerri, Petroleum Geologist, Oil Division, Office of the Prime Minister, Malta,
Mr. Mario Degiorgio, Petroleum Geologist, Oil Division, Office of the Prime Minister, Malta,
Mr. Tarcisio Zammit, First Secretary, Embassy of Malta to the Netherlands,
Miss M. L. Grech, Administrative Assistant, Office of the Prime Minister, Malta.

## OPENING OF THE ORAL PROCEEDINGS

The **PRESIDENT**: The Court meets today for the oral proceedings in the case concerning the *Continental Shelf*, which was instituted by the notification on 26 July 1982 of a Special Agreement signed on 23 May 1976 between the Socialist People's Libyan Arab Jamahiriya and the Republic of Malta.

This Special Agreement provided for the submission to the Court of a dispute concerning the delimitation of the continental shelf between the two countries, and defined the Court's task more particularly in the first article.

Since the Court did not include upon the bench a judge of either Libyan or Maltese nationality, both Parties have exercised the right conferred on them by Article 31 of the Statute of the Court to choose a judge *ad hoc* to sit in the case. The Court therefore sits with the participation of Judge Jiménez de Aréchaga, designated by the Libyan Arab Jamahiriya, and also of Judge Valticos, designated by the Republic of Malta in succession to Judge Castañeda, who previously participated in the proceedings but has, I regret to say, felt obliged to withdraw for reasons of health.

The solemn declaration required to be made by judges *ad hoc* under Article 20 and Article 31, paragraph 6, of the Statute was made by Judge Jiménez de Aréchaga at a public sitting on 14 October 1983, and I now call upon Judge Valticos to make a similar declaration. May I ask all present to stand while the Declaration is made.

M. **VALTICOS**: Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.

The **PRESIDENT**: Please be seated. I place on record the solemn declaration made by Judge Valticos. Judge Jiménez de Aréchaga will be able to join us only a little later this afternoon.

The oral arguments which are about to be presented have been preceded by written proceedings in which each Party has filed a Memorial, a Counter-Memorial and a third pleading, a Reply, submitted at their specific request under the terms of their Special Agreement. The case became ready for hearing when the Replies were duly filed on 12 July 1984.

Article 53 of the Rules of Court provides that the Court may, after ascertaining the views of the Parties, decide that copies of the Pleadings and documents annexed shall be made accessible to the public on or after the opening of the oral proceedings. The Court has today taken a decision in that sense.

In accordance with Article II of the Special Agreement, and following consultation with the Parties, the Republic of Malta will present the case first.

## ARGUMENT OF MR. MIZZI

AGENT FOR THE GOVERNMENT OF MALTA

Mr. MIZZI: Mr. President, Members of the Court. It is my privilege to open before this distinguished Court the case of the Republic of Malta in its dispute — or as the other Party prefers to call it, its "difference" — with the Socialist People's Libyan Arab Jamahiriya concerning the principles and rules of international law which are applicable to the delimitation of the continental shelf appertaining to Malta and that appertaining to Libya. The dispute extends also to the way in which, in practice, the principles and rules identified by the Court as applicable to the delimitation of the continental shelf of the Parties can be applied by them in this particular case, in order that they may, without difficulty, delimit such areas by an agreement to be concluded in accordance with the findings of the Court.

The dispute, or difference, which has brought our two countries before this Court has been the only one to taint what has otherwise been an exemplary relationship between friendly neighbours; a relationship which may more aptly be described as brotherly. This does not mean that there are no differences of opinion, no differences of appreciation or of approach, between the Governments of the two countries: no two States, just as much as no two individuals, are that much alike. Indeed one of the main factors contributing to the excellent relations that exist between the Parties is the recognition of, and respect for, one another's individuality as a nation and as a sovereign State.

But the difference between the two Parties concerning the extent of their continental shelf is of a very different category. It concerns — indeed affects very directly — the extent of their jurisdiction and of their very sovereignty. For Malta, moreover, the issue has been both vital and urgent.

While the question may have been equally important for Libya from the juridical and perhaps even the political aspect, once it had taken a position in conflict with that of Malta, the delimitation of its shelf with Malta has never been on Libya's list of priorities.

Malta's position has been quite the opposite. In the 1970s Malta had the task of diversifying an economy which had for centuries been geared to service the military requirements of stronger and bigger nations into an economy based on manufacturing, agriculture, fisheries, tourism and other peaceful activities. For these Malta required — and still requires — both capital and sources of energy, possibly of its own. Its urge to find out whether the Maltese shelf contained the mineral resources which could provide it with the necessary sources of energy and of the resultant capital is too obvious to need further justification or elaboration.

Hence the insistence by Malta in making such arrangements with neighbouring States as would enable it to proceed with the exploration and exploitation of the natural resources which nature — so little generous on land — may have placed beneath the waters surrounding the Maltese Archipelago.

In the early 1970s, when technology had advanced sufficiently to permit exploration further to the south of Malta, and when the exploration carried out to the north and east of Malta, in shallower waters, had not been encouraging, while at the same time the economic demands were increasing, the urge for further exploration came to apply more particularly to the parts of the Maltese shelf which faced Libya. It was also the part which offered the best prospects. Contrary to expectations, Libya chose to contest Malta's claim to a line equidistant between it and Libya: hence the present dispute which, at one stage, seriously disturbed the relations between the two countries and brought co-operation to a standstill.

I do not propose to recall any of those regrettable events, for these are now things of the past, and ever since the Jamahiriya ratified, in 1982, the Special Agreement of 1976 (**I**, pp. 5-8), the two countries have again been closely co-operating together for the welfare of their people. It is not possible, however, to avoid all reference to some aspects of the history of the dispute which is before the Court.

Thus it is important, in Malta's view, to recall that the dispute did not arise in 1965, when Malta first informed the Libyan Government of its intention to abide by the 1958 Geneva Convention on the Continental Shelf. Nor did it arise in 1966, when Malta enacted the Continental Shelf Act, 1966, adopting the median line as the line delimiting its continental shelf from that of its neighbours, unless another line were agreed to. Libya, though fully aware of Malta's intentions and of their subsequent implementation, raised absolutely no objection. On the contrary, since Libya had been specifically requested to state whether or not it was "in full accord" with Malta's position concerning the determination of its maritime boundaries, including, of course, the Malta-Libya boundary, Libya's silence could only mean that Libya was "in full accord" with that position.

I myself recall going to Tripoli in those early days of Malta's independence and being given, by the Libyan Government of the day, all the help and information the Maltese Government had requested to initiate the process for what eventually became concessions for the exploration and exploitation of Malta's continental shelf. There was not, then, the least doubt in anybody's mind that the appropriate boundary with Libya (as well as with Italy) was the median or equidistant line.

Of course, at that time the need for an agreed boundary with Libya — or with Tunisia — did not arise. Technologically the exploitation of the areas north of a median line with Libya, or east of a median line with Italy or Tunisia, was not feasible in all areas nearer Malta. What was urgent, therefore, as far as Malta was concerned, was an agreement with Italy, and only with respect to the area between Malta and Sicily. This agreement was in fact reached, and, although it was only a provisional one, it was sufficient to enable both countries to proceed to the physical search for, and exploitation of, the natural resources of their respective continental shelves; exploitation being obviously limited to the areas which contained natural resources.

With respect to Libya the situation was quite different. As the Maltese Minister of Justice and Parliamentary Affairs — quoted by Libya — said in the Maltese Parliament during the debate on the Bill which eventually became the Continental Shelf Act, 1966, the desirability of an agreement with either Libya or Tunisia was not then relevant. To use his words: "In so far as Africa is concerned, this matter [that is, delimitation by agreement] is not relevant today." In the context of the Minister's statement, "today" meant July 1966; and it is clear that at that time the area requiring an agreed delimitation line was that facing Sicily.

This is why Malta took one course of action with respect to Italy and a different course of action with respect to Libya, and why it took no action at all, at least at that time, with respect to Tunisia and the Pelagic Islands belonging to Italy.

With respect to Italy, Malta sought to reach some form of an agreement delimiting the respective zones of jurisdiction in the area between Sicily and Malta. With respect to Libya, Malta gave notice of its intentions for the future and sought Libya's assent to the position it intended to adopt. Malta therefore sent the Note Verbale of 5 May 1965. This Note, while giving due notice to Libya, did not press for a formal agreement on a definitive line. The Note, however, did put Libya on notice and, contrary to what Libya suggests by quoting from the debates in the Maltese Parliament of July 1966, Malta had every intention in due course to establish the boundary of its continental shelf in the direction of Libya.

This intention not only results very clearly from the facts just stated, but is also confirmed by the point made by the then Leader of the Opposition, Mr. Mintoff, during the same debates in the Maltese Parliament and reproduced by Libya in Annex 1 of its Reply *(supra)*. Mr. Mintoff, in 1966, pointed out that:

> "There is a shallow part in this area which divides Malta from Libya which is so shallow as to permit it to be exploited for the purposes of research for the exploration of oil, and I think that what the Government meant to say when it said that the sea was deep was that the shallow part was so much nearer to Malta that there should not be much cause for dispute on this point between ourselves and Libya."

The shallow part referred to by Mr. Mintoff is the Medina Bank which is in fact nearer to Malta than it is to Libya. On the other hand, the area where a median or equidistant line would have been negotiated with Libya, had Malta pressed for an agreement in 1966, would have been to the south of the "shallow area" known as the Medina Bank, and therefore at depths which then precluded exploitation. This is why Malta felt it irrelevant at the time to initiate negotiations with Libya. As far as Malta was aware Libya was "in full accord" with Malta's views as to the principles and rules which governed delimitation between the two countries.

There can therefore be no question as to what that position was and still is. The position of Malta has always been that, as between opposite States, the continental shelf of each of them extends up to the limits recognized by international law as pertaining to them until these meet and overlap. The areas of overlap must then be divided, and the dividing line indicated by equity and by the legal principles flowing from the very concept of continental shelf, that is entitlement on a basis of equality to a maximum natural prolongation and non-encroachment, is the median or equidistant line.

This position was never contested by Libya until 1973. Even at the first meeting held in July 1972 — some seven years after the Note Verbale of May 1965 — with the object of formalizing an agreement on the actual boundary, the objection raised by the Libyan delegation did not concern the principles and rules governing the matter as viewed by Malta. The objection concerned a mere detail, namely, the use of the island of Filfla, to the south of Malta, as a basepoint. It was only at a subsequent meeting — that of 23 April 1973 — that Libya first departed from its implied acceptance of Malta's position and advanced its own concept and theory of proportionality, namely, that the common continental shelf was to be divided in proportion to the lengths of the respective coastlines. The result was the proposal of that same date, and this
⑤ is reproduced as Figure 1 of the dossier[1] which Malta has prepared for the

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[1] The folders that were specially prepared for the use of the Court by the Parties in order to illustrate their oral arguments have not been reproduced. If a map or illustration included in a folder is reproduced in the maps volume of the present series (**V**), this is indicated in the margin of the text. *[Note by the Registry.]*

benefit of the Court, and which the Members of the Court are respectfully asked to use for ease of reference.

From the undisputed facts which occurred between 1965 and April 1973 one cannot but conclude that there was then no cause for dispute between Malta and Libya concerning the extent of their continental shelf.

Of course, once Libya decided on a different course, the situation changed. Indeed, at least on paper and by word of mouth, the position changed so radically that the Libyan claim was pushed to such extremes as to encroach on waters over which Malta exercises uncontested jurisdiction, not only with respect to rights related to the contiguous zone but also with respect to the exclusive fishing rights within a 25-mile limit.

At the same time, however, even after 1973, the Libyan conduct with respect to other matters, such as concessions for petroleum activities, was quite different. In fact, while these concessions were clearly indicative of a claim to sovereignty south of the median line with Malta, they were on the contrary indicative of hesitation and doubt in so far as they extended northwards of this line.

The two Libyan concessions which encroached in part on what Malta considers to belong to it, are NC 53 in favour of Total Libya and the concession made to Exxon on 29 September 1974. Apart from the doubts still unresolved concerning the northern boundary of NC 53 — which, contrary to Libya's suggestion in its Reply, have not been laid to rest — it is unquestionable, because it results from Libya's own documentation as presented to the Court, that in both these concessions the undertaking by the licensee to carry out a "work programme" was expressly restricted to such areas as not to require either Total or Esso to carry out operations in the areas north of the median line, before the boundaries of the continental shelf of Libya with neighbouring States, including Malta, had been finally determined by agreement. Indeed, as will be seen shortly, in the case of NC 53 the very boundary of this concession was made coterminous with such an international boundary.

The words used in the case of Total Libya are: "after international boundaries have been agreed upon" (*supra*, LR, Ann. 3-a); and in the case of Esso Standard Libya Incorporated, the words used are:

> "until such time as there has been a demarcation of the offshore area subject to the jurisdiction of the Libyan Arab Republic (as it then was) from the offshore area subject to the jurisdiction of Malta".

Moreover, as has already been shown in Malta's written pleadings, both Total and Exxon expressly stated in their formal communications to the Maltese Government that they had not carried out any activities in areas claimed by Malta.

It is also worth noting, at this stage, that even if one were to regard these concessions as some form of a Libyan claim and even if the extent and shape of NC 53 were considered, for the sake of argument, to be those suggested by Libya, even these concessions fall far short of the Libyan 1973 claim and are also considerably less than what Libya is now claiming.

In contrast to what may be described as a Libyan attempt to stake a claim by merely appearing to do so, Malta's conduct is clear evidence of its consistent claim to the entire area facing Libya, up to the equidistant line. Not only has Malta given out concessions up to the very limits of its claim; it has also in all its concessions imposed a work programme applicable to the entire area of the concession. Moreover, in respect of at least Blocks 14 and 16, whose southern boundary is the median line itself — they are shown on Figure 2 of the dossier before the Court — this could not be otherwise. The same commitment, however, also applied to Blocks 9, 10 and 11 as well as to the more northerly Blocks 2, 3 and 4.

As to the Libyan concession NC 53, the question of dates appears to have now been resolved: the Heads of Agreement were signed on 14 April 1974, while the Exploration and Production Sharing Agreement was signed in October 1974 and came into force on 17 December 1974. The southern part of this concession also appears to present no problems; but both the western and northern boundaries are still very much undefined.

⑦ Although the map attached to the Libyan Law of 17 December 1974 — at least as now reproduced by Libya — does give a shape to the concession similar to that which Libya reproduced as Map 11 of its Memorial, neither the Heads of Agreement nor the Exploration and Production Sharing Agreement establish any precise line. On the contrary, both these documents (with some allowance for an evident omission in the Heads of Agreement as reproduced in Annex 3-a of the Libyan Reply, *supra*) describe the western and the northern boundary of this concession as a line corresponding to:

> "the seaward limit of jurisdiction of the Libyan Arab Republic over the sea-bed and subsoil underlying the Mediterranean Sea as established by or pursuant to an agreement between the Libyan Arab Republic and any other relevant Mediterranean State claiming jurisdiction over such sea-bed and subsoil".

However, the work programme undertaken by Total with respect to this area is limited to 6,000 square kilometres, an area which very nearly corresponds to the area shown by Petroconsultants as the area of NC 53.

Far therefore from having laid to rest Malta's doubts about this Libyan concession, the facts as they result from Libya's own documentation are unequivocally that the northern boundaries of NC 53 would only be defined in due course when the Malta-Libya and Italy-Libya line will be agreed; and secondly that both NC 53 and the Exxon concession were made without any commitment on the part of the licensee to carry out any petroleum activities north of the median line between Malta and Libya.

These facts further confirm Malta's submission that by their conduct the Parties have indicated that the median line is, to say the least, very relevant to the final determination of the boundary in the present case.

Libya sees in what it calls the "no-drilling understanding" "an important element of mutual conduct that is relevant to the delimitation question". I have tried hard to see the logic of the Libyan conclusion and I must admit that I could not find any. I feel at the same time that Malta should not run the risk of again being accused, without foundation, of avoiding all reference to the matter. I have said "without foundation" because Malta has already answered the Libyan allegation in Chapter I of its Reply. It was there pointed out that the so-called understanding stems from a remark contained in the United Nations Secretary-General's Report to the Security Council; and it was also pointed out that Libya would have presented a more balanced picture of the situation if it had quoted the Secretary-General's Report more fully. In fact, Libya failed to quote the part of the Report which justified Malta in undertaking drilling operations.

The true facts are that there is and can be no evidence, whether written or oral, of any such understanding, if by understanding is meant a binding commitment, as Libya seems to imply. No such commitment was ever given or implied, or indeed sought by either side.

It is, on the other hand, understandable that once Malta and Libya had agreed to have the dispute settled peacefully by referring it to the Court for adjudication, both of them were expected, if for no other reason out of respect for the Court, to refrain from certain activities in delicate areas. There were also other very practical reasons, not least of which the excellent relations existing between the Parties, which counselled a similar course.

This conduct of self-restraint, however, was only to be expected in so far as the dispute was before the Court; and until the Special Agreement was ratified not only was the dispute not before the Court but no progress towards its resolution could be registered.

I do not wish to recall the unhappy history of the Special Agreement between 1976, when it was signed, and 1982 when it was ratified by Libya. As I have already said, these are things of the past and are better forgotten. In the circumstances, however, I cannot avoid recalling the promise which Libya made — in my presence — that the Agreement would be ratified within a week. That week turned first into months and then into years.

Malta could reasonably be expected not to seek to enforce its claims while the case was pending before the Court, as it now is; but as events turned out, no reasonable person could expect Malta to suffer passively the inactivity of the other Party, even if Malta had in fact committed itself to do so — which it had not.

So much, therefore, for the so-called "no-drilling understanding".

I shall now, with your permission, Mr. President and Members of the Court, go back for a moment to the events of 1973.

April 23 of that year is a very special day in the history of the dispute before the Court. Although the meeting held on that day was not the first one at which delegations from the two countries had met to establish an agreed boundary, this was the very first occasion on which Libya contested the validity of Malta's position. Even as late as a few months earlier — in July 1972 — Libya had merely contested the use by Malta of a few particular basepoints, namely those resulting from the use of Filfla, for the purpose of establishing stranght baselines; and consequently Libya was still, by its conduct, accepting that the equitable and otherwhise appropriate dividing line was the median line. But on 23 April a radical change took place in the Libyan position; and it may be said that it was on that date that the present dispute first arose. On that date Libya took the position that the continental shelf between the two countries was to be shared between them in proportion to the length of their respective coastlines. To use the very words of the Libyan delegation "the distance between the two coastlines was divided in the same proportion that the two shorelines bore to each other".

At the discussions held in Valletta and Tripoli during the ensuing months, it became increasingly clear that the change in the Libyan position was due to the belief that this is what in essence had been decided by the Court in the *North Sea Continental Shelf* cases. In Libya's view the Court had, in those cases, discredited equidistance, whether as a principle or as a method, and had decided that in order to satisfy equity delimitations had to reflect the ratio between the lengths of the coastlines of the two States.

In justification of this thesis Libya quoted, at times *ad nauseam*, the words of the 1969 Judgment "a reasonable degree of proportionality . . . between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast". But Libya would not acept that —

1. The decision in the *North Sea Continental Shelf* cases did not indicate "a

reasonable degree of proportionality" as a principle or rule of international law applicable to delimitation, but merely as a factor which the Parties to that case were to take into account in the course of the negotiations of the boundaries — an element to which the Court accorded the last place among the factors to be so taken into account; and

2. That in the *North Sea Continental Shelf* cases not only was the delimitation to be effected between adjacent States but between States placed in very special circumstances of adjacency, where the use of median or equidistant lines would indeed have resulted in an inequitable delimitation.

Nor would Libya accept that other cases, particularly those between opposite States, could be dealt with, and were as a rule dealt with, differently. It was pointed out to the other side that the Court had, in the very same Judgment of 1969, given a clear indication of the application of the principles and rules it had itself identified to the case of opposite States — as is the present case. In paragraph 57 of the decision in the *North Sea Continental Shelf* cases, in fact, the Court held that

> "The continental shelf areas off, and dividing opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be determined by means of a median line."

The Maltese delegations had also invited their Libyan counterparts to look at what other States had done, especially in comparable situations. At that time, that is around 1974-1975, 44 delimitation agreements had been signed between States in various parts of the globe. Of these 22, or one-half, were between opposite States and the other 22 were between adjacent States. In all but 9 delimitations the States concerned had relied on equidistance. In other words equidistance had been applied by agreement in almost 80 per cent of the delimitations so settled. This practice was constant whether the agreements were entered into before or after the 1969 Judgment, and thus showed beyond the shadow of a doubt that Libya's interpretation of the *North Sea Continental Shelf* Judgment was wrong. Conversely, no known case had applied any form of proportionality, much less the form of proportionality advanced by Libya. Even Germany, in its delimitations with Denmark and the Netherlands, had for the most part accepted equidistance, and any addition obtained through negotiations after the 1969 Judgment was in no way related to proportionality.

The views of Malta and Libya, however, whether on the then only case forming the jurisprudence on the subject or on State practice, which was already quite substantial, remained so divergent that it was clearly impossible to reach an agreement, except that of referring the divergence to the Court. Thus in May 1976 a Special Agreement was signed in Valletta where the Parties agreed to refer their differences to the Court and agreed also to abide by its decision.

Mr. President, this brings me to the *Task of the Court*.

By the Special Agreement (I) the Court is requested to decide two things: Firstly,

> "what principles and rules of international law are applicable to the delimitation of the area of the continental shelf which appertains to the Republic of Malta and the area of continental shelf which appertains to the Libyan Arab Republic";

and secondly,

> "how in practice such principles and rules can be applied by the two

> Parties in this particular case in order that they may without difficulty delimit such areas by an agreement as provided in Article III".

The first request is intended to resolve the differences between the Parties as to the principles and rules of international law which are applicable in the present case; and although, quite naturally, these differences still exist — indeed they are greater now than they have ever been — there is no divergence between the Parties as to the task of the Court in this respect.

By the second request the Parties have asked the Court to indicate not only which are the applicable principles and rules, but also how in practice, these can be applied by the Parties in order that the Parties may — *without difficulty* — establish the actual boundary by agreement.

The Parties had foreseen that if the decision of the Court were to be limited — as in the *North Sea Continental Shelf* cases — to a mere enunciation of the applicable principles and rules of international law, there would remain the possibility, or more likely the probability, that the disagreements between the Parties would re-appear when it came to drawing the line. Libya could not accept that the line itself should be drawn by the Court as, in its view, this was preferably done by agreement between the Parties. Malta on the other hand was afraid that if room were left for argumentation as to the proper way of applying the principles and rules identified by the Court as being applicable to the case, the reference of the dispute to the Court would fail to achieve its main objective.

In fact the purpose of the reference is not that of obtaining an academic response to the legal questions submitted to the Court, but the practical result of an agreed boundary to enable both Parties to know with certainty the extent of their respective jurisdictions. The Parties did agree to draw the line themselves, but they also agreed that following the decision of the Court this should be a simple exercise: an agreement to be reached, as the words of the Special Agreement expressly provide, "without difficulty". This aim cannot be achieved unless the Court were to state in the clearest possible terms how the exercise is to be carried out.

Libya has since suggested that the task of the Court in the present case is more similar to that arising from the Special Agreements in the *North Sea Continental Shelf* cases than to that assigned to the Court in the *Tunisia/Libya* case.

Malta submits that the request to the Court contained in the Special Agreement in the present case was specifically intended to give a second task to the Court, in addition to that which it was given in the *North Sea Continental Shelf* cases. The task of the Court in those cases was very much in the minds of the Parties when they added what is very clearly a further task in the present case: an additional task having a very specific and important purpose, at least for Malta. Moreover, in Malta's case the issue is a very urgent one, and Malta cannot wait indefinitely for a clear indication of the areas subject to its jurisdiction.

The same situation apparently applied to Tunisia whose Special Agreement with Libya was, with a few additions, a reproduction in Arabic and French of what Libya had already agreed with Malta in English and Arabic. In the *Tunisia/Libya* case the Court was also requested to take account of matters which it is not expressly requested so to do in the present case; but the purpose of the request that the Court should indicate the practical way in which the principles and rules it identifies as applicable may be applied by the Parties, is in both cases identical: that of having a boundary established by agreement between the Parties, but established "without difficulty" on the basis of the findings of the Court.

Having briefly stated Malta's position on this issue, I may, with the Court's permission, conclude with the words of the Court in the *Tunisia/Libya* case. Malta agrees that also in the present case the whole controversy is of minor importance "since [the Court] has in any case to be precise as to what it decides". In the *Tunisia/Libya* case the Court could not "agree with the repeated reference of Libya to 'guidance' as defining the requirements of what the Court should specify". In the present case Libya has avoided the word "guidance", but it is in substance repeating the views it held in the case with Tunisia. Malta respectfully asks the Court to decide on this matter in the same way as it did in the *Tunisia/Libya* case.

Malta, however, agrees with Libya on one question concerning the task of the Court. This concerns the extent of the Court's decision in view of possible claims from third States. Malta agrees that the Court should not feel inhibited from extending its decision to all areas which, independently of third Party claims, are claimed by the Parties to this case. Indeed if the Court were to exclude any area so claimed because of present or possible future claims by Italy it would — contrary to its own decision on the application by Italy to intervene in the present case — be deciding on Italy's claims vis-à-vis either Malta or Libya or both.

In Malta's view the proper course for the Court to take, and I say this with great respect, is to recall expressly that the rights of third States are safeguarded by Article 59 of the Statute of the Court. The Court, however, could not indicate any areas to which its judgment ought not to extend. First of all it is physically impossible for the Court to do so: in fact, the claims so far advanced have not only changed several times but are also still very much undefined. In any case there can be no guarantee that those are the only claims to which the areas contested by the Parties to this case may be subjected, or that Italy is the only State that may advance a claim. Secondly, it is Malta's submission that it would be legally wrong for the Court to refrain from adjudging on an area claimed by the Parties to the present case on the ground that third States have also indicated that they may lay a claim to it. By so doing the Court could be deciding — beyond its jurisdiction — that the claim by the third State may be justified.

Whatever the adjudication by the Court as between Malta and Libya, the rights of third States will remain unaffected. Indeed, as Libya has pointed out, if in such areas the Court will have indicated whether, as between Malta and Libya, a particular area is to be regarded as appertaining to either Malta or to Libya, the third State would know beforehand to which of the two States it ought to direct its claim when it decides to do so.

Malta, however, does not share Libya's view that the Court may distinguish between those areas where there is no claim and the areas where there is one. In Malta's view, if the Court were to make such a distinction it would run into the very same difficulties it would encounter if it were to decline to extend its judgment to all areas claimed by the Parties. In fact, any distinction between areas where there is a claim and areas where there is not would have no practical purpose and would be objectionable on jurisdictional grounds.

Such a distinction would have no practical purpose since it could be contradicted by subsequent events. There can in fact be no end to claims by third States until a final agreement covering all possible claims is entered into between all States in the area. Until this happens an area described by the Court as free from claims may be subjected to a claim by a third State; and conversely an area subject to a claim at the time of the Court's decision may subsequently cease to be so. A claim could also, as are Italy's claims in the present case, be so obscure and undefined that it would be practically impossible to define the area to which the claim refers.

In Malta's view, moreover, the Court should not make such a distinction. As already submitted, it would be legally wrong for the Court to do so. In its Judgment on Italy's application to intervene the Court said expressly that if it were to identify areas to which Italy could lay a claim this would, to use the Court's own words (see para. 30):

> "be tantamount to the Court's having made findings, first as to the existence of Italian rights over certain areas, or as from certain geographical points or sets of points; and secondly as to the absence of such Italian rights in other areas, or as from certain geographical points or sets of points".

It is Malta's belief that all that needs to be done to protect the rights of third States, is an express *caveat* recalling that whatever is contained in the Judgment in the case between Libya and Malta does not (indeed may not) affect the rights of third States, whether they have or have not laid a claim to any of the areas covered by the Court's decision. Anything beyond that could very well amount to a finding with respect to such claims, either in a positive or a negative sense and this must — for jurisdictional reasons — be avoided.

Mr. President and Members of the Court, I shall now turn to the differences between the Parties that concern the issues of substance upon which the Court has been requested to adjudicate by the Special Agreement.

These are: the identification of the principles and rules of international law which are applicable to the delimitation in the present case and the way in which the principles and rules so identified are to be applied in order that Malta and Libya may, in practice and without difficulty, draw the line which separates their respective continental shelf areas.

It is not my task to develop Malta's views on these matters. The case for Malta will be more fully and more ably presented to the Court by my learned friends and colleagues. My submissions will be limited to a very cursory and quite brief review of the main points of difference between the Parties in order to present to the Court an outline of Malta's case. My contribution will therefore include a criticism of the Libyan written pleadings, but only in their essentials, and will set out Malta's case in its broad outline.

The case for Libya — as it now stands — has been set out and developed in its written pleadings. Viewed from the legal aspect, Libya's case differs considerably from the position taken by Libyan delegations during the discussions that led to the signing of the Special Agreement. On the other hand, from the practical point of view, that is in respect of the physical extent of Libya's claim, there has been little change, if any, in Libya's quest for the lion's share of the continental shelf between Malta and Libya.

The change in Libya's position as to the principles and rules applicable in the case consists mainly of two developments.

The first is the introduction of an entirely new element : the physical features called by Libya the "Rift Zone" and the "Escarpments-Fault Zone"; and Libya's perception of natural prolongation in the context of the continental shelf.

The second is the attribution of a different role to proportionality: while Libya had previously considered proportionality as the main principle or rule governing delimitation in the present case, it now appears to accept that proportionality has a much more modest function.

But before examining these changes on their merits, it is pertinent to make certain preliminary observations.

Until Libya filed its Memorial in April 1983, it had based its case exclusively on proportionality and had attributed to proportionality the role of a legal principle or rule. It is not in any way being suggested that Libya could not, or should not, have changed position or brought in new arguments. Libya was perfectly free to do so. But the fact remains that it was not until 1983 that Libya first advanced the view that physical features in the sea-bed and subsoil were relevant to the delimitation of the Parties' continental shelf. Nothing of any legal relevance — such as case law or State practice — had happened in the meantine to justify such a radical change, and it may therefore be reasonably assumed that the reason for it was a realization that the legal basis previously adopted had been wrong.

The second point that needs to be made — or rather repeated, because it has already been made in the Counter-Memorial — concerns the names given by Libya to the physical features which, according to Libya, are the termini of Malta's physical natural prolongation, particularly the various and diverse physical features which Libya calls the "Rift Zone". There are, no doubt, various and diverse geological and geomorphological features in the Pelagian Basin, and there are areas — not just one area, but areas — within that Basin, in which, according to some geologists at least, there has been rifting; there are also areas — and again not just one but more than one area — where the rifting is still active. But what Libya has done is to take one particular area — the area which suits it — and call it the Rift Zone. The area which Libya designates by that name is, however, known to geologists, geomorphologists and geographers, and is shown on all maps — not by the Libyan name — but by the separate names of the separate features which Libya groups together. These are the Pantelleria Trough, the Malta Trough, the Linosa Trough, the Malta Channel and the Medina Channel. When the whole area — not the sea-bed features, but the geographical area — is referred to by scientists, the name generally used is the Sicily or Sicilian Channel.

Libya first baptized these features collectively by the name "Rift Zone" in its Memorial. It then admitted quite frankly that it did so, to quote Libya's own words "for reasons of simplicity" (I, LM, p. 29, para. 3.12). But Libya has since been using that name as if the area were in fact known by that name. No one else, not even the Libyan scientists have used that expression in the way Libya does. Indeed the authors of the Libyan Technical Annex attached to its Memorial had clearly refused to do so. The Court will recall what Malta pointed out in its Counter-Memorial, namely that Professor Fabricius declined the paternity not only of the Libyan assertion that the northern limits of the Pelagian Block are marked by the Rift Zone, but also of the name itself. Even more recently, Professor Finetti, in the Libyan Reply refers to the area not as the Rift Zone but as the Sicily Channel Rift Zone.

The third point to be made as a preliminary to more substantive observations is that it is practically impossible for Malta not to refer to the so-called Rift Zone by that name. Malta disagrees entirely with Libya's views on this matter and must therefore refer at least to the Libyan concept called the Rift Zone in order to contradict it. Moreover the Court by now knows exactly which area one is referring to by the use of that name, and it would be inopportune and probably also too cumbersome to refer to that area by some other expression.

The point I wish to stress here is that when Malta uses that expression it does not do so — as Libya has suggested — because Malta accepts the existence of this zone, with the consequences Libya wishes to draw from that acceptance, but merely because it is either compelled to use that expression to rebut the Libyan submissions or, as Libya itself first used that name, "for reasons of simplicity" or convenience.

The Court, however, must not draw any other conclusion from the use of the Libyan expression by Malta. Indeed it may perhaps not be amiss to observe in this connection that the repetitive use of particular expressions can have the effect of producing an unconscious acceptance of what is intended to be conveyed by those expressions. In extreme cases it could even take the form of brainwashing. Of course I am sure Libya had no such intentions: I am simply recalling a psychological reality which has to some extent conditioned even Malta's own way of expressing itself although, of course, it is not Malta's way of thinking.

Having made these observations and clarified Malta's position, I shall, and so will my colleagues, feel free to refer to the "Rift Zone" whenever we need to refer to the area called by Libya by that name. At the same time we shall, at least occasionally, place that expression in quotes in order that our position may not be misunderstood.

With these preliminary observations out of the way, I can now, Mr. President, turn to the substance of the issues which arise from Libya's use of the physical features of submarine areas relevant to the delimitation.

The submissions which conclude the Libyan Memorial (**I**), as well as its Counter-Memorial (**II**) and the Reply *(supra)* — and which therefore may be taken to be the substantive submissions of Libya to the Court — summarize the Libyan position on the physical features of the sea-bed and subsoil of the area which constitute the continental shelf between Malta and Libya in the following terms:

> "A criterion for delimitation of continental shelf areas . . . can be derived from the principle of natural prolongation because there exists a fundamental discontinuity in the sea-bed and subsoil which divide the areas of the continental shelf into two distinct natural prolongations extending from the land territories of the respective Parties." (Submission No. 4.)

On the basis of that submission and of the other submissions in which Libya sets out the principles and rules it believes to be applicable, Libya formulates its last submission (Submission No. 9) in the sense that:

> "The principles and rules of international law can in practice be applied by the Parties so as to achieve an equitable result, taking account of the physical factors and all the other relevant circumstances of this case, by agreement on a delimitation within, and following the general direction of, the Rift Zone as defined in the Libyan Memorial."

These submissions contain in a nutshell Libya's position on the physical factors which it derives from the geology and geomorphology of the region. The Libyan case rests also on the geography of the area; but this is something which will be considered in other contexts. For the moment only the geology and geomorphology of the area which are regarded by Libya to be relevant are under consideration. In respect of these physical features Libya asserts that the "Rift Zone" constitutes a fundamental discontinuity in the sea-bed and subsoil of the submarine areas lying between Malta and Libya. From this fact, coupled with its views of the relevant circumstances, Libya concludes that the delimitation should follow the direction of the Rift Zone and should be contained within it.

To these submissions Malta replies, and believes it can show conclusively, that Libya's case is untenable both in fact and in law.

Although no reference is made in the submissions to the physical features east of Malta which Libya calls the "Escarpments-Fault Zone", it is also Libya's view that Malta's continental shelf terminates at these features, and that all areas to the east of them constitute a continental shelf to be delimited between Libya and other States, that is Italy and presumably Greece. In Malta's view this Libyan claim is not merely untenable, it is preposterous.

In view of the complexity of these issues I shall deal with them under three separate headings:

1. The "Rift Zone" and the physical facts.
2. The "Rift Zone" and the law.
3. The "Escarpments-Fault Zone".

### 1. THE "RIFT ZONE" AND THE PHYSICAL FACTS

There are obviously several facts concerning the submarine area between Malta and Libya on which scientists will readily agree; there are other facts on which some scientists will agree; there are also other facts which, though there is not in their regard outright disagreement between scientists, are, however, differently interpreted or evaluated, or are facts to which scientists will give a different emphasis. This is only natural. Moreover there is still, in respect of the relevant areas much work to be done, both in research and study; and the complete facts concerning several of the parts that make up the area are still to be ascertained.

One must therefore be very careful in reaching conclusions on such limited knowledge and it must be said that in most respects the scientists engaged or quoted by the Parties take this cautious approach.

No so Libya. Libya rushes to the conclusion that the scientific facts show clearly that there is such a fundamental discontinuity in the submarine areas between Malta and Libya that the "Rift Zone" is in fact the southern limit of the Maltese continental shelf and the northern limit of the Libyan shelf.

No such conclusion is reached by any of the scientists engaged or quoted by Libya. This conclusion is of Libya's making and, in Malta's view, completely without scientific foundation. All that the scientists — even the Libyan scientists — say is that there is an area mostly to the west and south-west of Malta, and extending, but in a much reduced form, to the south of Malta, in which tectonic and other forces, including rifting, have produced troughs and lesser grabens or channels. Some of these grabens are quite deep, while the channels are rather shallow.

Quite naturally, for scientists these features may be very important for the study of the region, and may even call for special attention. But nowhere do any of the scientists that have contributed to the case, whether through a direct contribution or through their independent work, nowhere do any of them say that these features — even if they could be collectively called a rift zone — are such that they divide the Pelagian Basin into two distinct and separate geological units. All they do is describe the features and try to identify their origin and history.

When it comes to statements such as "Libya has shown in its Memorial and Counter-Memorial that the Rift Zone constitutes a fundamental discontinuity in the areas of the continental shelf between Libya and Malta" (*supra*, LR, para. 5.21), or to the assertion that "This evidence shows that [the Rift Zone] cannot be regarded as other than a fundamental discontinuity in the sea-bed and subsoil in areas of shelf lying between Libya and Malta" (*supra*, LR, para. 5.29), it is Libya that is gratuitously asserting that it is so. None of these conclusions can be attributed to any of the scientists. They are all Libyan assertions to which none of the scientists have subscribed.

On the contrary, Libya's advisers have had to disclaim the paternity of certain Libyan positions; and have also felt compelled to explain that a Libyan position is not shared by scientists. Thus, in his contribution to the Technical Annex to the Libyan Memorial, Professor Fabricius found it necessary to describe one of the limits of the Pelagian Block in the following terms:

> "The northern limits of the Block are defined by the Libyan Memorial as created by the Rift Zone running from the Strait of Tunis, across the Pantelleria, Linosa and Malta Troughs and the Malta and Medina Channels to the Heron Valley."

As a scientist he could not but attribute the definition to Libya; he could not say it was his own, because it was not. Indeed, he also felt compelled to add:

> "Other definitions adopted by some scientists place the northern boundary of the Pelagian Block extending as far north as the Sicilian coastline." (Para. 3A of p. I-4 of the Technical Annex, I.)

Professor Fabricius had also assisted Libya in the case with Tunisia, and he could not have failed to recall that in that case even Libya had placed the northern boundary of the Pelagian Basin much farther to the north than the newly found Rift Zone.

The Libyan scientists, without distinction, frequently refer to the area between Malta and Libya by its well-known and established name of Pelagian Sea or Pelagian Basin or Pelagian Block — as it is variously called; and the Rift Zone, whether it is referred to by that name or by the name of the individual features which Libya includes within that name, is considered to be a part of that whole area and not as being one of the boundaries of the area. To quote but one instance from another Libyan scientist, Professor Finetti, one may pick as a typical example the view expressed by him in his paper reproduced as part of Annex 7 of the Libyan Reply *(supra)*. There Professor Finetti says

> "The Pelagian Basin is generally characterized by large areas having flat or slightly deformed sea-bed morphology. However, cutting across the sea-bed of the Pelagian Basin from the Egadi Valley to the Heron Valley are the huge troughs of Pantelleria, Linosa and Malta and the Medina and Malta Channels."

These features, which together make up the "Rift Zone" could not cut across the Pelagian Basin if they constituted its northern boundary; they can cross it only if they are part of it.

Similar views are to be found in other technical studies produced for Libya or quoted by Libya. Moreover, the area through which the Rift Zone is claimed to pass, is accepted without question as being a region with its own proper name — the Pelagian Basin, Block or Sea; a simple name accepted by all scientists. These facts, and their acceptance by scientists, contradicts the Libyan view that the Pelagian Sea or Basin ends at the "Rift Zone", as well as the Libyan contention that the area north of the "Rift Zone" is fundamentally distinct from the area to the south of that zone.

There is also in the work of one of the Libyan experts, a more explicit contradiction of these Libyan theses, and a confirmation of the Maltese view that the Pelagian Block is indeed one block geologically. In his contribution to the Technical Annex attached to the Libyan Memorial, Professor Fabricius gave the following opinion:

> "The block-like character of the sea-bed underlying the Pelagian Sea is especially emphasised by the deep escarpments to the east, forming a natural border to the Ionian Basin and the Sirt Basin (or Rise) which contain abyssal plains almost 4,200 metres in depth." (I, LM, Technical Annex, p. I-5.)

What expression could better describe the unity and compactness of the Pelagian Basin, from Sicily all the way down to Libya, than the expression used by Professor Fabricius to describe it, that is, its "block-like character"?

In view of this scientific evidence which contradicts rather than supports the Libyan claims concerning the "Rift Zone" in the Sicily Channel, it is not at all surprising that while making these claims Libya unwillingly has to accept the basic continuity of the Pelagian Block. Of course it cannot do this directly; but there can be little doubt that it does so indirectly when it disregards or plays down — for it cannot deny — the other areas of rifting cutting through other parts of the Pelagian sea-bed and subsoil.

As Professor Mascle has shown, and as will be further shown during these hearings, there has been rifting in much of the Pelagian Basin. The illustration, ㉔ Figure 3 of the dossier before the Court, shows a system of faults and also where the rifting has taken place. Some rifting is still active in more than one area; and the same illustration also indicates where this is so. It will be seen that the areas of faults, as well as of active rifting, are to be found both in the vicinity of Malta and to the south in the vicinity of Libya. This is accepted by Libyan experts, such as Professor Fabricius, although he points to differences in degree between the two; and the Libyan pleadings make no serious attempt to deny the conclusion of Professor Mascle.

Nor could Libya expect to show otherwise. As the paper prepared in 1981 by Christian Blanpied and Gilbert Bellaiche — a copy of which is included in the Maltese dossier as Document A for the convenience of the Court — as this paper shows, the rifting and other forces to which the Sicily Channel has been subjected are in no way unique. There are other faults, such as those which have given rise the the Jarrafa Trough in the southern Pelagian Basin, which are known to be presently active and to have been active over the same time-span as the Pantelleria, Linosa and Malta grabens. What Libya has done is to divert all attention to one particular area and give it a name, in order to create the impression that there is only one such area or zone in the region, that one which it suits Libya to highlight.

Blanpied and Bellaiche have also pointed out in their study just referred to that, while the northern grabens, such as those of Pantelleria and Linosa, have been the subject of previous work — covering the years 1964 and 1979 —

> "little attention has been paid to the troughs located on the southeastern end of the Tunisian platform, that is, the Jarrafa and Tripolitanian Troughs, except from a purely geomorphological aspect".

Now, Blanpied and Bellaiche conclude that the Jarrafa Trough — and their study is limited exclusively to that feature — can conclusively

> "be considered as an element of the intercontinental belt of grabens defined by Illies (1969) that runs from Sardinia through the Strait of Sicily to the African grabens".

Libya's excuse for disregarding these physical features, much closer to its coasts, is that they fall outside the disputed area. However, apart from the fact that the area to be divided between Malta and Libya is the whole area lying between the two countries, and the Jarrafa and Tripolitanian Troughs are therefore within the area in dispute, the point Malta is making is that the whole of the Pelagian Basin is a geological continuum. Consequently it is very relevant to establish whether or not there are in this whole area, and not merely in the area chosen by Libya, physical features of such a nature as to destroy that continuity. Clearly, if there are physical features which could have that effect, and if that effect has legal consequences, they must be taken into account wherever they are, because the same effect and the same legal consequences must be given to them whether they are in the vicinity of Malta or in the vicinity of Libya. It surely cannot be said — though this is what Libya does — that the Sicily Channel rifting is relevant because it is nearer Malta than Libya, or the Jarrafa-Tripolitania rifting is not because it is nearer Libya. What can, on the contrary, be said is that since the rifting to the south is accepted by both Parties as not producing a fundamental discontinuity in the shelf, the rifting in the north, which is of an identical nature and has had the same origin and very similar history, cannot have that effect.

Libya sees a contradiction in Malta's position concerning the southern troughs. Libya says that by pointing to these grabens Malta contradicts its view of the Pelagian Block as a geological continuum. The contradiction is in Libya's position not in Malta's. Malta considers that neither the Sicily Channel rift zone, that is the northern troughs, nor the rift zone in the area of the Jarrafa and Tripolitanian Troughs in the south, constitute a fundamental discontinuity in the geology of the region, and is therefore perfectly logical in its approach to the matter in issue. Libya, on the contrary, regards the northern troughs as having the effect of destroying that continuity, but denies the same effect to the southern troughs. Libya looks at these features not objectively, as Malta does, but in the perspective of its interests: hence the blatant contradictions in the Libyan positions.

A very similar contradiction is also evident between the position now taken by Libya and that which Libya took in its case with Tunisia. Libya was then bent on proving that it could claim the whole of the Pelagian Basin directly to the north of its coastline — or landmass — on the strength of what it called its "northward thrust". It was therefore in Libya's interest to accept the truth about that Basin, namely that it is a geological and geomorphological unit.

The following quotations — all taken from the Libyan Counter-Memorial in the *Tunisia/Libya* case — will suffice to prove this point.

The first quotation —

> "The continental shelf area concerned is basically undifferentiated and forms part of the Pelagian Basin, a distinct geologic and geographic unit . . . without marked features that would affect delimitation . . ." (P. 10, para. 25.)

The second quotation from the Libyan Counter-Memorial —

> "We are here dealing with a simple shelf, a physiographic unit, part of the Pelagian Basin." (P. 103, para. 233.)

The third quotation —

> "The geological evidence demonstrates the existence of a single continental shelf . . . That shelf forms a portion of the Pelagian Basin which is itself a geologic and geographic unit forming a component of the stable North African plate." (P. 158, para. 391.)

The final quotation —

> "The entire Basin is a geologic and physiographic unit . . ." (P. 197, para. 491.)

Libya dismisses these clear statements confirming the scientific view that the Pelagian Basin is a single geological and geomorphological unit by the mere excuse that in the *Tunisia/Libya* case the relevant area was different from that in the present case. There is no question that the area for delimitation in the two cases is different, but it is clear from the parts of the Libyan pleadings just quoted that Libya makes a clear-cut distinction, in those statements, between the area for delimitation and the Pelagian Basin, of which the former is expressly stated to be only a part. The expressions "geologic and physiographic unit", "geologic and geographical unit" and "a distinct geologic and geographic unit" were, without the shadow of a doubt, used by Libya not to describe the areas relevant for delimitation with Tunisia but to describe the whole of the Pelagian Basin.

In conclusion, Malta's submission on the geological and geomorphological features of the area relevant for delimitation in the present case may be summarized as follows:

1. The Pelagian Block or Basin is a geological and geomorphological unit or continuum. Like most, if not all, other faults, it has undergone tectonic and other forces, including some which have caused rifting, in the case of the region in question throughout much of the area comprised in it, but, this notwithstanding, the Pelagian Block has retained its essential or basic unit.
2. The zone in the Sicily Channel, which Libya has called the Rift Zone, is just one of such areas where there has been, among other effects, a rifting; moreover this rifting, both in the Sicily Channel and in the Jarrafa and Tripolitanian Troughs, is still somewhat active, though it has been on the decrease for several million years.
3. Neither the rift zone in the Sicilian Channel nor any other feature in the Pelagian Basin, including other areas of rifting, are such as to disrupt the essential or basic unity of the sea-bed and subsoil underlying the Pelagian Sea.

*The Court adjourned from 4.33 p.m. to 4.48 p.m.*

Mr. President, Members of the Court, I had just finished dealing with the aspect of the Rift Zone in its relation to the physical facts. I shall now deal with the second aspect, the Rift Zone and the Law.

### 2. THE "RIFT ZONE" AND THE LAW

Libya claims that the Rift Zone in the Sicily Channel terminates the natural prolongation of the land territory of Malta and that, consequently, the Libyan shelf may be regarded as extending northwards up to that zone. To use other Libyan expressions having more or less the same effect, Libya claims that because of the existence of what it calls "these critical elements" the boundary should be within, and follow the general direction of, the Rift Zone.

This Libyan thesis is untenable in law even if it were true as a physical fact — which it is not, as I believe Malta has shown — that the troughs and channels comprised in the Rift Zone did in fact constitute a fundamental discontinuity in the Pelagian Basin. In order to show this, the Rift Zone will be treated as if it were in fact a feature which physically could be relevant to delimitation and not, as Malta believes it to be, just one of several features of a similar or comparable nature, origin, and even history, which are to be found in the

Pelagian Basin without, however, affecting its fundamental or essential unity. In this part of my introduction to Malta's case I shall try to show that even if Libya were correct in its evaluation of the physical elements of the case, these facts would still not lead to the legal conclusions drawn by Libya. In contemporary international law these facts are irrelevant to both entitlement and delimitation, except, in respect of entitlement, in the special circumstances of very wide shelves — which are certainly not those of the present case.

The Libyan argument rests, on the legal plane, on Libya's notion of natural prolongation in the context of the continental shelf. Libya accepts that:

> "The natural prolongation of the respective land territories of the Parties into and under the sea is the basis of title to the areas of continental shelf which appertains to each of them." (Submission No. 2.)

And also that:

> "The delimitation should be accomplished in such a way as to leave as much as possible to each party all areas of continental shelf that constitute the natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the other." (Submission No. 3.)

As long as Libya does not embark upon its own interpretation of "natural prolongation" as used in the various passages it quotes from judgments and other authoritative sources, there is not much difference between the Parties in this case on the principles and rules just enunciated. Malta could very well subscribe to them as they are described in the Libyan Submissions. But as soon as Libya starts developing its arguments based on natural prolongation, it becomes clear that except as will be seen in the area of entitlement, Libya identifies the legal concept of natural prolongation in the context of the continental shelf with the purely physical elements of the phenomenon known by that name. Consequently for Libya, even such a physical feature as a trough or a series of troughs and channels, could be sufficient to interrupt — not just physically but also legally — the natural prolongation of the land territory of a State into and under the sea.

In Malta's view this line of argument completely lacks support in international law and is in contradiction of the contemporary law of the continental shelf.

It is of course accepted that the continental shelf as a legal concept owes its origin to physical considerations; but it is equally well established that, as a legal concept, the continental shelf has never been equivalent to what a geologist or a geographer would consider as strictly falling under that name in a scientific sense. As the Court had occasion to observe in both Judgments concerning the delimitation of continental shelf areas — or rather in all three Judgments concerning the delimitations of continental shelf areas — although the legal concept derives from the natural phenomenon, it has, to use the Court's own words, "pursued its own development" and this development consisted in a "widening of the concept for legal purposes" (1982 Judgment, pp. 45-46, paras. 41-42).

Even in 1958, only a few years after the Truman Proclamation, the constraint on the extent of the shelf was placed by the Convention of that year not on the morphology of the sea-bed, much less on its geology, but on the progress achieved by technology, which was already advancing very rapidly, with the result that there were in fact no definable limits to the extent of the continental shelf that could be claimed by a State so long as the natural resources of the sea-bed and subsoil could be exploited.

The concept has since developed still further and the continental shelf now extends at least up to 200 nautical miles from the coast unless the physical phenomenon itself extends beyond that distance. Except in these latter, and rather rare, cases, the extent of the natural prolongation of a State's territory into and under the sea for the purposes of establishing the limits of the continental shelf now depends exclusively on distance. What is beneath the water throughout that distance, no matter how deep, indented or deformed the seabed may be, and even if the ocean floor is reached, a State may regard all those submarine areas as appertaining to it *ipso jure*, unless and until any such areas may also be claimed by an equal and identical entitlement by other States.

This is, in the opinion of Malta, the present state of customary international law; it is now also reflected in the 1982 Convention on the Law of the Sea. The continental shelf as a purely physical notion never did alone form the basis of title to continental shelf rights: these derived from a legal concept which always differed somewhat from the natural phenomenon. As time passed and "the legal concept pursued its own development" by a "widening of the concept", the physical elements gradually lost even the little relevance they may have retained, until, as Judge Jiménez de Aréchaga concluded in the *Tunisia/Libya* case, "the geological and geomorphological elements . . . [were] left out by the International Law Commission in 1956 and the Conference in 1958". These elements have now only the effect of extending the continental shelf of a State beyond 200 miles from its coast, whenever the physical elements themselves extend beyond that distance.

To the question therefore which Libya puts in its Memorial (**I**) at paragraph 6.08, that is whether natural prolongation, too, has lost all relevance, the simple answer is: yes, it has, if by natural prolongation one intends, as Libya does for certain purposes, the purely geological or geomorphological elements that form the continental shelf as known to scientists. This view has been confirmed by the most recent of judicial pronouncements namely the Judgment in the *Gulf of Maine* case. In that Judgment the Chamber, while recognizing the contribution to the formulation of the law made by the Court in the 1969 Judgment, added that in the *North Sea Continental Shelf* cases the Court had "attributed more marked importance to the link between the legal institution of the continental shelf and the physical fact of the natural prolongation than has subsequently been given to it" (para. 91); and later on, the Chamber expresses the view that the concept of adjacency "can be credited with the ability to express, perhaps better than that of natural prolongation, the link between a State's sovereignty and its sovereign rights to adjacent submerged land" (para. 104).

Libya does not seem to argue against the proposition that the outer limits of the continental shelf of a State may be defined by reference to a distance of 200 miles. In fact it is Libya's view that where there are "no problems of delimitation with neighbouring States . . . entitlement and delimitation (in terms of absolute outer limits) go hand in hand"; and it goes on to add that

> "whether the outer limits are defined in terms of a 200-miles limit or the outer edge of the continental margin, the correlation between entitlement and outer limits exists precisely because no question of a boundary with a neighbouring State is contemplated" (**I**, LM, para. 6.06).

These statements presuppose the acceptance by Libya that, when it is simply a question of establishing the outer limits of the continental shelf of a State, with respect not to another State but to the international community, and no question of delimitation with another State is involved, a State is entitled — as Article 76 of the 1982 Convention provides — to a shelf 200 miles wide, irrespective of the physiography of the sea-bed, or beyond that distance if the outer edge of its continental margin lies beyond it. When, therefore, it is merely a question of entitlement, the outer limits of a shelf are determined, as a rule, by distance alone.

But when the object of the exercise is the delimitation of areas in respect of which there are conflicting claims Libya distinguishes between —

(1) "a situation where neighbouring States are located on different shelves, in terms of distinct natural prolongations"; and

(2) "a situation where neighbouring States are located on the same shelf, and where the shelf area in question may be regarded as much the natural prolongation of the one as of the other on the geological and geomorphological evidence" (**I**, LM, para. 6.08).

According to Libya, in the first situation "the evidence of 'natural prolongation' is fundamentally evidence of a geological and geomorphological character and serves to establish the basis for the boundary between different shelves". In the second situation the physical structure of the shelf "may still serve as a useful or determinant criterion for delimiting the shelf" but its role "is that of a relevant factor, not that of a limit to the area of entitlement" (**I**, LM, para. 6.09).

In order to evaluate the Libyan argument properly, and to answer it adequately, Malta has in all honesty tried to establish whether Libya considers the present case to fall under the first or the second of the situations which Libya itself envisages, and which have just been described in Libya's own words; but Malta has been unable to come to a definitive conclusion.

The Libyan formal submissions speak of a "fundamental discontinuity" such as to "divide the areas of continental shelf into two distinct natural prolongations extending from the land territories of the respective Parties". This and other statements to more or less the same effect, seem to place the present case in the first category of situations described by Libya. But in its Reply, *supra*, at paragraph 6.19, Libya takes offence because Malta has, according to Libya, accused it of "suggesting that the Rift Zone should constitute the boundary between the continental shelf areas appertaining to each of the Parties". In the same context Libya explains that

> "it has never advanced the proposition that the Rift Zone *per se* constitutes a natural maritime boundary between the States. Rather, Libya's position is that the Rift Zone provides critical physical elements for the determination of a boundary line which would be within and follow its general direction."

This Libyan explanation seems to indicate that Libya places the present case in the second category of delimitation situations, namely, one in which Malta and Libya are located on the same shelf, and therefore the shelf area in question may be regarded as much as the natural prolongation of Malta as of Libya on the geological and geomorphological evidence; but there are what Libya calls "critical physical elements [the "Rift Zone"] for the determination of a boundary line which would be within and follow its general direction".

I must confess that I am still somewhat doubtful as to which is in fact the Libyan position; it could be that there is a third category of situations which we have not heard about yet. We may, in fact, not have heard the last word on the matter.

But whichever the category in which Libya will finally place the present case it is clear that the Libyan argument is in any case seriously flawed because —

*(a)* Libya has given a different meaning to natural prolongation according to whether the concept is used in the context of the determination of the outer limits of a State's jurisdiction or in the context of a delimitation between States; and

*(b)* in the context of delimitation between States, Libya identifies natural prolongation, even on the legal plane with physical features and makes it dependent on the geological and geomorphological structure of the seabed.

Malta believes it can show — indeed that it has already shown in its written pleadings — that neither of the above Libyan positions is legally tenable.

As regards the first of these positions, it is Malta's view that a legal concept cannot have different meanings simply because it is placed in different contexts; all the more so when these two contexts — entitlement and delimitation — though separate and distinct are, at the same time, intimately related. It is true that the two concepts are quite distinct: in fact, as was noted in the 1969 Judgment, the Court "did not regard an equitable delimitation and a determination of the limits of natural prolongation as synonymous" (p. 46, para. 44). At the same time it is undeniable that unless a State can establish its entitlement to an area there can be no question of a delimitation of that area with another State. In other words, unless there is an overlap of entitlements no question of delimitation can arise.

That is why Malta says that entitlement and delimitation always go hand in hand. But if they do, and the one, delimitation, is at least in some important respects, dependent on the other, entitlement, how can the same concept (natural prolongation) have one meaning for mere entitlement and a different — a completely different — meaning where conflicting entitlements call for a delimitation?

The second Libyan position I have just referred to has, I believe, already been shown to be wrong, and I shall therefore limit myself to a very brief recapitulation; and it is this: while the natural phenonemon was at the origin of the legal concept of continental shelf, the two have never been identical and the legal concept has pursued its own development by a widening of the concept for legal purposes. The physical elements have over the years gradually disappeared altogether up to a distance of 200 nautical miles from the coast, and up to that limit the only relevant factor is distance. The Rift Zone, therefore, whatever its true nature may be, is relevant for the determination of the legal issues between the Parties.

This conclusion has the support of the jurisprudence and State practice.

Both this Court and the Court of Arbitration in the Anglo-French Continental Shelf case refused even to consider such natural features as the Hurd Deep, the Jarrafa Trough and the Tripolitanian Furrow. With respect to the Hurd Deep the Arbitral Court expressly held that "there was no intrinsic reason why a boundary along this axis [i.e., the axis of the Hurd Deep] should be the boundary". The Court regarded the location of such features as a matter of chance — "a fact of nature", as the Court put it, which had no legal consequence.

In the *Tunisia/Libya* case the Court rejected categorically the argument that the delimitation of the areas of shelf appertaining to Tunisia and Libya should be made by reference to their natural prolongation as this might be established on geological or geomorphological considerations. The position taken by the Court in the *Tunisia/Libya* case is very significant, since in that case both Parties had based their case on scientific elements — Libya essentially on geology and Tunisia essentially on geomorphology — and both had requested the Court to decide the case on that basis. It is true that the Court did not entirely exclude that there may be cases where physical features might be a factor to be taken into account; but the more important fact about that Judgment is that the Court did not take account of any of the scientific elements submitted by the Parties to the Court as a basis for its decision.

In the *North Sea Continental Shelf* cases neither geological nor geomorphological considerations were included among any of the principles and rules of international law identified by the Court as applicable to delimitation. The physical and geological structure of the areas involved were indicated by the Court merely as a factor to be taken into account by the Parties in their negotiations; and the wording used by the Court in that connection suggests that the Court was at least as much concerned about the natural resources which the geological structure of the area could show to exist or not to exist, or to exist across possible boundaries, as about the existence or otherwise of depressions.

In the *Gulf of Maine* case, even though geological factors were not significant, the Chamber nevertheless did observe that

> "a delimitation, whether of a maritime boundary or of a land boundary, is a legal-political operation, and that it is not the case that where a natural boundary is discernible, the political delimitation necessarily has to follow the same line" (para. 56).

Turning to State practice I feel it can be said with confidence that, with but one exception on which I shall comment later, no delimitation out of the 80 cases known to have been made by agreement between States, takes account of trenches, troughs, channels, deeps, depressions and other features, even where these are of a kind which could mark the limits of the physical continental shelf of the States concerned. As was pointed out in the Maltese Memorial, a similar observation had earlier been made by the Court of Arbitration in the Anglo-French case. The Court had held that:

> "to attach critical significance to a physical feature like the Hurd Deep – Hurd Deep Fault Zone in delimiting the continental shelf boundary in the present case would run counter to the whole tendency of State practice on the continental shelf in recent years" (p. 6, para. 10).

Malta has already indicated in its written pleading the delimitations in which very significant features — some of which are much deeper and more important than the rift zone in the Sicily Channel — played no part whatsoever. I shall therefore limit myself to a brief reference to the more important examples.

Though the depressions in the North Sea are not excessively deep — they range between some 400 and 700 metres — it is well known that none of the delimitations between the several States that border this sea have given any weight whatever to the geology or geomorphology of the region. On the contrary, with the exception of a limited part of the delimitation between Germany and the Netherlands and Germany and Denmark, all the delimitations have been effected on the basis of equidistance.

The Cuba-Mexico agreement of 26 July 1976 takes no account of the Campeche Escarpment and the Yucatan Channel, although they are some 3,000 metres deep; and the delimitation boundary is equidistant from the two countries.

The Cuba-Haiti agreement of 27 October 1977 ignores the Cayman Trough, which is 2,900 metres deep, and the two States expressly stated that they relied on equidistance to effect the delimitation.

The same may be said with respect to two other agreements in the Caribbean Sea involving Colombia and the Dominican Republic (11 January 1978) and the Dominican Republic and Venezuela (3 March 1979). Neither of these agreements takes account of such a notable structure as the Aruba Gap which reaches a depth of 4,600 metres, and in both cases the delimitations relied not on a physical phenomenon, the location of which is a mere accident of nature, but on the more equitable and the more reputable method of equidistance.

The examples of delimitations which treat depressions in the sea-bed as if they were not there are not limited to areas outside the Mediterranean. Indeed two of the delimitations which amply support Malta's submissions on the irrelevance of physical features concern areas which are very closely linked to the present case. I am referring to the Italy-Tunisia and the Italy-Greece agreements. ㊱ The Court can see these delimitations on Figure 4 of the dossier. The delimitations have been reproduced on a bathymetric map of the Central Mediterranean in order that the Court may relate these delimitations with the relevant physical features of the region.

In the first of these agreements, viz. that between Italy and Tunisia, the area which was delimited included not just parts of what Libya calls the Rift Zone and which it invokes as the limit of the Maltese shelf, but the more geologically important sectors of that zone. By their agreement Italy and Tunisia have shown in the clearest possible way that the very same structures which Libya now considers as constituting a fundamental discontinuity in the sea-bed and subsoil, were, for both Italy and Tunisia, features which were totally irrelevant for the purposes of delimitation.

On the other side of Malta, that is to the east, there is what is probably the most important depression in the entire Mediterranean covering a huge area of tens of thousands of square kilometres and reaching depths of over 4,200 metres. It is known as the Ionian Abyss or Abyssal Plain, and its name gives a clear indication of the nature of this unique feature of the Mediterranean. Notwithstanding all this, when Italy and Greece agreed on a delimitation which covers most of the areas of shelf common to them, they took absolutely no notice of this feature even though geologically and geomorphologically it dwarfs the Rift Zone into insignificance.

They drew a perfectly equidistant line which, as the Court may see on ㊱ Figure 4, runs right across the deepest central part of the Ionian Abyss, in complete disregard of the geology and the geomorphology of the area. And if this were not enough, Libya has made it clear that it regards part, indeed the larger part, of this depression as included in its own continental shelf, at least in its relations with Italy and Greece. This Libyan claim proves beyond doubt that Libya's own practice contradicts the position it has taken with respect to the Rift Zone in the Sicily Channel and confirms the general State practice that physical features are ignored in the process of delimitation. Of course Libya does not apply the same standards to Malta, whether with respect to the "Rift Zone" or the "Escarpments-Fault Zone"; but as evidence of State practice Libya's approach to the Ionian Abyssal Plain (as well as to Jarrafa and Tripolitania Troughs) is the clearest confirmation by Libya itself that physical features are considered by States to be legally irrelevant.

The only exception to this practice of States is the Timor Trench or Trough. There are, however, certain considerations about this physical feature of the submarine area between Australia and the island of Timor which show it to be quite different from any other feature so far encountered in areas delimited by agreement, and to be therefore, to use legal jargon, a bad precedent.

The first consideration is the well-known one that in extent and depth there are few features that are comparable. The *Australian Year Book of International Law, 1970-1973*, 1975 (pp. 145-146), describes it as

> "a huge steep cleft or declivity called the Timor Trough extending in an east-west direction, considerably nearer to the coast of Timor than to the northern coast of Australia. It is more than 550 nautical miles long and on the average 40 miles wide, and the sea-bed slopes down on opposite sides to a depth of over 10,000 feet. The Timor Trough thus breaks the continental shelf between Australia and Timor, so that there are two distinct shelves, and not one and the same shelf, separating the two opposite coasts."

The nature of this Trough is the second consideration. In the view of Australia, the Timor Trough is of such a kind that there is no common area south of the Trough which could be divided between Timor and Australia; and it would appear that this line of reasoning had been accepted by Portugal at the time Timor was in part a Portuguese possession. The argument, however, is not accepted by Indonesia to which State the whole of Timor now appertains.

It may usefully be recalled here that the delimitation so far agreed covers only part of the submarine areas between the island of Timor and the northern coast of Australia. There is still a gap, several miles wide and commonly referred to as the Timor Gap, which has still to be delimited. Australia, obviously, wishes to close the gap by a straight line joining the two ends of the gap. Indonesia, however, is understood to be pressing for a boundary on the basis of an equidistant line. In this connection it is interesting to note that, in the light of what the Indonesian Minister for Foreign Affairs is reported to have said earlier this year, it would appear that Indonesia is basing its position on contemporary law (the distance principle), while the delimitation already effected had been based on the concept of the shelf as it had developed in 1958 at the time of the Second Conference (the exploitability principle). The report containing the Minister's statement was carried in a Melbourne newspaper, *The Age*, of 31 March 1984.

The third and very important fact about the Timor Trough is that geologically there is in fact not just two separate continental shelves, but each of those shelves originally belonged to different continents, or rather to different plates. Originally Australia and Timor were many thousands of miles apart and they are only close together now because they have been inexorably moving towards one another while the intervening ocean was pushed down the trough into the earth's mantle. So in a very real scientific sense the Timor Trough marks a fundamental discontinuity between Australia and Timor. The Timor Trough is a "subduction zone" where ocean crust is being forced down into the earth's mantle by plate tectonic motions.

The trenches that are comparable to it are the Peru-Chile Trench along the west coast of South America, the Tonga-Kemadec Trench north of New Zealand and the trenches off Japan. Nearer to the area in question in the present case, the Hellenic Trench may very well be the result of tectonic forces similar to those which formed the Timor Trench, that is to say the plate tectonic motions which brought the European and African plates together.

The depressions which Libya calls the Rift Zone are, however, a very different species. The sea-bed and subsoil of the area through which that zone runs is all part of the same continental block, part of the African plate. The inexorable motions of the European and African plates towards one another and the subsequent motions of those two plates, and the consequences of the forces unleashed by those motions, could not have left the Pelagian Block unaffected. But that Block remains a part of the African plate, a pre-existing continental block, which, notwithstanding the immense forces to which it has been subjected over millions of years, has retained its essential continuity. I now pass to the third element.

### 3. THE "ESCARPMENTS-FAULT ZONE"

To conclude this part of my presentation on Libya's claim that Malta's continental shelf is to be confined within two physical features of the sea-bed, namely, what Libya calls the "Rift Zone" in the south and south-west and the escarpments in the east, I shall now say a few words about the second of these features.

㊲ As the Court can see by looking at Figure 5, or the bathymetric map at Figure 2 of the dossier presented by Malta for the convenience of the Court, running from just south of the toe of the Italian peninsula, down the eastern coast of Sicily in a south-easterly direction until it reaches midway between Sicily and Libya and then, first in a south-westerly and then again in a south-easterly direction almost right up to the Libyan coast, there is a scarp which is one of the most remarkable features of the Mediterranean. It is more than 700 kilometres long and the difference in level is between 1 to 3 kilometres. From Sicily to the north-east of Ras Zarrouq in Libya the scarp forms an abrupt transition between the epicontinental Pelagian Sea on the one hand and the deep parts of the Ionian Basin on the other. This is a brief but accurate description of what is essentially one escarpment.

Libya, however, chooses to pick out one part only of the escarpment — the one which lies east and south-east of Malta — and in the most arbitrary manner claims that Malta's continental shelf ends there. This claim, as I have already had occasion to remark, is not just unfounded, both in fact and in law; it is preposterous.

It must be observed in the first place that, in its remorseless attempt to shrink Malta's continental shelf to the smallest possible area, Libya even ignores the fact that the issue in this case is the delimitation of the areas of shelf which appertain to Malta and the areas of shelf which appertain to Libya. Consequently, as between Malta and Libya — and the case is limited to them — the area east of the escarpments, that is the whole of the area and not just the part chosen by Libya, is only relevant to this case in so far as part of it appertains to Malta and part of it appertains to Libya. To the extent, therefore, that such an area may appertain to third States or is to be divided between Malta and third States — and it is accepted that there are such areas — the issue is one outside the Special Agreement between Malta and Libya and therefore beyond the jurisdiction of the Court.

So much so that, in its formal submissions at the end of each of its written pleadings, Libya has not requested the Court formally to declare that Malta has no continental shelf in the area east of the escarpments. Even Submission No. 9, in which Libya suggests how in practice the principles and rules identified by the Court can be applied by the Parties, Libya refers only to the Rift Zone and there is no reference whatsoever to what Libya had earlier called the Escarpments-Fault Zone.

But Libya does suggest elsewhere in its pleadings that the area east of the escarpments is one for delimitation between Libya and other States; and Malta feels that the Libyan position should be shown to be absolutely without basis.

This Libyan position, in fact, is not just untenable; it is blatantly contradicted by Libya's own claim to it and by the submission that other States also could lay a claim to it — all, except Malta.

If the escarpments, whether physically or legally, had any relevance to the delimitation of the areas east of them any such relevance would have to apply equally to all the States of the area, and not just to Malta. If the escarpments did in fact end the continental shelf of Malta on the scientific plane, and if the legal and scientific concepts of the continental shelf were identical, then the Ionian Abyssal Plain appertains to no State — not to Malta, not to Libya, not to Italy and not to Greece. But, of course, neither of these premises leading to that conclusion is correct and consequently also the conclusion is wrong.

Although not enough is known about the escarpments which border the Ionian Basin from Italy down to Libya, it can safely be said that even scientifically, and taking the definition of the continental shelf beyond the 200-mile limit as extending to "the outer edge of the continental margin", it cannot be maintained — and Libya has not even suggested this — that even the deepest part of the Ionian Abyss is not part of the continental shelf; much less can it be said that the escarpments mark that outer edge.

On the other hand, if there is some doubt as to the physical nature of this
㊳ area, then it must be observed that, as can be seen from Figure 6 of the Maltese dossier, an arc of circle with a radius of 200 nautical miles drawn even from one basepoint on Malta will cover the whole of the area claimed by Malta; whereas the same cannot be said of similar arcs of circle drawn from any basepoint on the Libyan coasts. Thus Libya is clearly attempting to deny Malta areas to which it could not itself lay a claim unless physically they could be regarded as a continental shelf beyond the distance of 200 nautical miles. I need hardly add that if the area constitutes a continental shelf beyond 200 miles, because the natural phenomenon extends beyond that distance, it must *a fortiori* be a continental shelf within that distance and must therefore also be part of Malta's continental shelf.

Legally, of course, the Libyan claim is quite absurd and I do not feel I need to say much to make the point. Italy and Greece, and even Libya itself, regard the escarpments as having no legal relevance whatsoever in so far as their entitlements are concerned; and the same must, by the same legal logic, apply to Malta.

Not surprisingly, Libya argues that it has a long coast extending as far as Egypt. Is this relevant, one is bound to ask? If, as Libya appears to suggest, both science and the law deny to Malta a continental shelf east of the escarpments, is the law such as to enable Libya to overcome the scientific and legal obstacles because its coasts are longer? It would be a strange law which did that: a law not of equity or equitable principles, but a law ensuring that bigger States become even bigger and smaller States are deprived even of what is theirs.

This is not the law. Whether in international relations or as between citizens, the law does not deserve to be called by that name unless all were equal in its eyes. As Malta will submit when it comes to the same theme pursued by Libya under a different name, the fact alone of a longer coastline by itself generates larger areas of continental shelf but does not, and cannot, entitle a State to any privilege whatsoever, whether under the guise of science or, as Libya does elsewhere, under the guise of proportionality.

Libya is quite aware of this truth. At the same time its objective is to see that Malta gets the smallest possible share of the shelf. Libya therefore resorts to every kind of argument so long as it might serve its purpose. The physical features Libya calls the "Rift Zone" and the "Escarpments-Fault Zone" are nothing else but an excuse for a partition of the areas between Malta and Libya with more or less the same result — though not the reasoning — of Libya's 1973 proposal, that is to say "in the same proportion that the two shorelines bore to each other".

Mr. President and Members of the Court, I shall now turn my attention to the second main argument on which Libya rests its case, and that is —

## PROPORTIONALITY

The formal Libyan submissions summarize the Libyan position on proportionality in the following terms:

> "In the particular geographical situation of this case, the application of equitable principles requires that the delimitation should take account of the significant difference in lengths of the respective coastlines which face the area in which the delimitation is to be effected" (Submission No. 6);

and

> "The delimitation in this case should reflect the element of a reasonable degree of proportionality which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appartaining to the respective States and the lengths of the relevant parts of their coasts, account being taken of any other delimitations between States in the same region." (Submission No. 7.)

These two submissions — which are in effect two different formulations of what is essentially the same argument — may reasonably be taken to indicate that Libya invokes proportionality in the form of a ratio of the lengths of coastlines and attributes to it, if not the quality of a principle or rule of law, at least that of a necessary corollary — a requirement, Libya calls it — of equity. There are several other parts in Libya's written pleadings which — as Malta has already indicated in its pleadings — show that while Libya professes not to accord to proportionality the role of an independent source of continental shelf rights, in effect and as a matter of practice Libya relies on proportionality effectively as a basis for delimitation, and not as it would have us believe as a "test" of the equities of a delimitation resulting from the application of the principles and rules of international law which are applicable to the case.

Libya's dilemma is obvious. It cannot rely on proportionality as a principle or rule or as an independent source of rights.

In other words, it cannot base the boundary line it seeks on proportionality. At the same time Libya must invoke proportionality as more than a mere test and more than a mere factor for adjustment — the only roles jurisprudence has attributed to it — because if it did so Libya would be left with no basis for delimitation which proportionality could test or adjust. Libya is therefore compelled to dress up the version of proportionality which it adopted for the 1973 proposal with legal respectability and call it a test. In effect, however, the role given by Libya to proportionality in this case is much more significant and determinant than a mere test, or as a factor which the Parties may take into account.

Thus — to quote but one passage from the Libyan pleadings — at paragraph 6.90 of the Libyan Memorial (**I**) we find the following proposition, which is typical of the Libyan approach:

> "Although not a legal principle which itself gives rise to rights, proportionality as a factor or guide is intimately connected with the concept of the continental shelf based on natural prolongation; it may even be said that it is the necessary logical consequence of this concept since its purpose is to ensure that each natural prolongation will be accorded its appropriate weight."

This passage is a very good example of the role Libya attributes to proportionality. In fact what Libya does, practically throughout its written pleadings, is to develop *pari passu* its own version of natural prolongation, which is fundamentally based on the "Rift Zone", and its own version of proportionality, which is essentially based on the ratio of the lengths of coastlines, in order — and this is the object of the whole exercise — to arrive at a boundary which is practically the same one Libya started from in 1973.

That there is no rational or logical connection between the chance location of a depression in the sea-bed, or any other like feature, and the equally circumstantial difference in the lengths of the coastlines of the two States, need hardly be pointed out, much less stressed. The absence of any connection whatsoever is too obvious. But what Libya would have us believe is that by putting these two circumstances of nature together one obtains the legally appropriate boundary based on equitable principles.

The true legal position must be the opposite: if two facts of nature happen to coincide, this could be no more than a mere coincidence, and could therefore have no legal consequence. Unless the coincidence of two facts has a legal significance, and therefore in some way also a logical connection, such a coincidence must remain meaningless and therefore without any relevance in law. And if this is so when two circumstances happen to coincide, the logic of the legal irrelevance of such a coincidence must apply with greater conviction when the coincidence does not even exist in actual fact but has been artificially set up by Libya to create the illusion of a connection.

The two facts which Libya claims to be intimately connected, and which Malta regards as a coincidence of Libya's own making, are natural prolongation and proportionality. Malta has already shown that the Libyan version of natural prolongation is untenable on the facts and is contradicted by contemporary international law: the "Rift Zone" cannot, whether in fact or on the legal plane, be the basis of a delimitation. These arguments will also be developed further during the oral hearings; but for the present what remains to be shown is that the Libyan version and utilization of proportionality also lacks a legal basis.

Mr. President, Members of the Court, the phrase "a reasonable degree of proportionality . . . between the extent of the continental shelf areas appertaining to the coastal State and the length of its coasts" was first used by the Court in its 1969 Judgment. In order, therefore, to appreciate the true meaning and purport of that expression one must, in the first place, examine the circumstances of the case in which it originated and any explanations the Court itself may have given with respect to it.

The circumstances of the case are very well known and simple to describe. It was a case of three States on a concave coastline, with the State in the middle — Germany — hemmed in by the other two, the Netherlands and Denmark. All the concavity was practically to be found in the German coastline, while the coastlines of the other two States had a more favourable configuration. It was very clearly a case where the application of a method or methods of delimitation and the search for an equitable solution were very difficult.

It was in these circumstances that the Court indicated as a factor to be taken into account by the Parties "an element of a reasonable degree of proportionality" between the extent of the shelf and the length of the coast. Moreover, as the Court itself had, a few paragraphs earlier (para. 98), clearly stated, this exercise was to have a very specific purpose. To use the Court's own words, this factor was to be taken into account "in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions" (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 52, para. 98).

It was thus made abundantly clear, from the very moment in which it was first used, that the factor of a "reasonable degree of proportionality" was not one of such general application as would make it a requirement in all cases to be taken into account. Indeed the Court mentioned only two cases in which this was appropriate. It is not being suggested that these are the only two cases in which some degree of proportionality may properly be required to remedy what would otherwise be an inequitable result. But its adoption is limited exclusively to cases in which the application of the principles and rules of international law to a particular case create an imbalance or a distortion as a result of the special circumstances of the case, and such imbalance or distortion must be remedied in order that an equitable result may be achieved. Unless these conditions concur or, in other words, whenever the application of the principles and rules of international law do not create an imbalance or distortion — an inequity —, the "element of a reasonable degree of proportionality" has no part to play.

In its written pleadings Malta has quoted rather extensively from the jurisprudence to prove this point, and I am sure that my colleagues will again refer to some of these when they pursue this matter further, and I shall not therefore burden the Court with a further repetition. I shall only refer, and very briefly, to the latest case — that of the *Gulf of Maine* — in which even though the Chamber did take account of the difference in length of the coasts of the Parties for a limited purpose, it declared expressly its awareness —

> "of the fact that to take into account the extent of the respective coasts of the Parties concerned does not in itself constitute either a criterion serving as a direct basis for a delimitation, or a method that can be used to implement such delimitation" (para. 185).

The second point to be made — or rather recalled since it has been repeatedly made by both sides — is that equity does not mean or involve, much less require, a refashioning of geography. Indeed equity as a legal concept can only be applied within a legal framework; and, in the context of the continental shelf, this framework must reflect the geography of the region. That is why equity must respect geography and cannot refashion it.

Consequently, if a State which is entitled, by the applicable legal principles and rules, to a given extent of shelf were to have its entitlement reduced, in the name of equity, simply because an opposite State has a very long coast, equity would be refashioning nature and geography, and the result would be an apportionment of shelf areas based not on equity — which ought to respect geography — but on distributive justice: an objective which the Court has on more than one occasion held not to be the function of equity in cases of delimitation. This principles applies equally if, as often happens in the case of island States, the extent of the shelf to which a State is entitled is several times its land territory.

The legal basis of continental shelf rights is to be found in the State's sovereignty *ipso jure* over the natural prolongation of its land territory into and under the sea. For legal purposes the length of the coastline is immaterial and the shelf rights of a State extend seawards from its coasts irrespective of their length. Geographically this outward reach is regulated and constrained by the configuration of the coast, including of course its length; but on the legal plane a State is entitled to as much shelf as its coast can generate.

In order, therefore, that such entitlement may terminate, the shelf must either have reached the absolute limit recognized by international law — in most cases the 200-mile limit would apply — or have encountered an equal entitlement of another State arising from that State's seaward reach from its coasts. When this happens the areas in which the legally equal entitlement overlap have to be divided. Such a division can only be equitable if it leaves to each of the States concerned as much as possible of the areas of their respective natural prolongations. The same principle may also be stated in a negative form, namely, that the division cannot be equitable if it allows one State to encroach upon the natural prolongation of the other State. Since there is an overlap, to say that one State must not encroach on the natural prolongation of the other cannot be taken literally, since a total non-encroachment is impossible. The principle can, therefore, have only one meaning and that is that the area of overlap must be divided equally, as both this Court and the Court of Arbitration in the Anglo-French cases have held.

From the point of view of geography, the attributes of the two States may be equal or unequal; and when the lengths of the coasts are unequal the attributes will also differ in their extent. But this difference in extent, this inequality, is not an operation of equity or the law, but the result, the natural result, of two unequal facts producing unequal results.

The purpose of the "Trapezium Exercise", as Libya has called it, is exactly that of showing how a longer coast naturally produces a larger area of shelf. And the Court is invited again to look at the practical effects of a trapezium as
㊴ shown in Figure 7 of the dossier before it. But to give to a State an even larger share than that allocated to it by nature would amount to a refashioning of nature — a refashioning of geography.

Malta has, in its Counter-Memorial, drawn the attention of the Court to the fact that on the basis of boundaries which respect the geography of the Central Mediterranean and the rules of equity, and therefore on the basis of boundaries broadly reflecting an equal division of areas between various States, Libya would — without encroaching on the areas of shelf appertaining to others — retain an area which is approximately nine times the area Malta would obtain on broadly the same basis. Libya has taken this observation to mean a recognition by Malta of a form of proportionality test (**II**, LCM, para. 6.33).

That was not, of course, the purpose of the facts given by Malta. What Malta intended to show, and I believe Malta has shown, is that on the basis of the appropriate method of equidistance which Malta believes to be applicable in this case, the longer coastline of Libya generates a shelf by far larger than the area of shelf which Malta's smaller coastline is capable of generating.

That this is so has the best possible confirmation in Libya's own calculations. In footnote 4 of page 41 of its Counter-Memorial (**II**), Libya gives the extent of the area which Malta's "trapezium construct" — to use Libya's phraseology — would allocate to Malta and to Libya respectively. According to these calculations, out of 288,074 square kilometres, Malta would get 47,848 and Libya 240,230 square kilometres. Malta has not taken the trouble to check whether or not the Libyan calculations are exact — nor does it matter in Malta's view whether the ratio between the areas is 1:5 or 1:9 or any other ratio — because the object of the trapezium exercise is intended to show the mathematical truth that in circumstances such as the present ones, a longer coastline necessarily generates a larger area of shelf; and this is precisely what the Libyan figures show.

What Libya, by its calculations, has confirmed is that a longer coastline generates a relatively larger area of jurisdiction than a shorter coastline. I said a relatively larger area and not a proportionately larger area: neither in nature nor in the legal concept of continental shelf is there any room for the kind of proportionality Libya seeks to apply in the present case. Both nature and the law give to Libya a substantially larger area of shelf than that which is allocated to Malta. And this is as it should be; but what nature and the law have allocated to Malta Libya must not covet.

In the footnote from which the Libyan calculations have been drawn, Libya not only makes calculations which are so precise as to turn the "test" of proportionality into an accurate mathematical exercise — which of course it should not be — but refers also to landmass and again makes very precise calculations between the landmasses of Libya and Malta and their relationship to the areas which a trapezium exercise would allocate to the two Parties.

This is not the only place where Libya tries to draw legal conclusions concerning continental shelf rights from the size of the landmass. In fact a recurring theme throughout Libya's pleadings is that Libya is huge; that not only has Libya a very long coast but it also has a very large area of land territory behind that coast. Malta, on the contrary, is very small and its coastline is very short.

The length of the coastline of a State, given normal circumstances, necessarily affects the extent of the maritime rights it generates. Landmass, on the contrary, has absolutely no bearing whatsoever — whether physically or legaliy — on the size of the continental shelf, or of any maritime right of a State. A State may have a huge landmass and a very short coastline; but it is only the coastline that matters. Only the coast generates maritime rights and influences the extent of the areas over which they are exercisable. All the landmass behind the coast is completely irrelevant. The same is true about the opposite case: a State may have a long coastline and only a few miles of hinterland. That State will have a very large continental shelf which bears no relation to the depth of its land territory.

An island, because it is surrounded by water and therefore its natural prolongation extends in all directions, must, in normal circumstances, also generate rights over the surrounding sea areas, which may also not be proportionate to its size. But these are facts of nature, the realities of geography which — according to the jurisprudence — must not be changed or refashioned.

These principles of international law apply to all maritime rights; from the territorial sea to the contiguous zone, from the exclusive economic zone to the continental shelf. Both in customary international law and in jurisprudence there has always been one part only of the land territory of a State which is recognized as capable of generating maritime rights: the coast.

And it is only the coast and its configuration, including its length, which can determine or influence the extent of the areas in which the State exercises those rights. The landmass of the State is irrelevant.

From these brief submissions on the question of proportionality, the following conclusions may be drawn:

1. Proportionality is not a principle or rule of international law applicable to the delimitation of the continental shelf; nor is proportionality an independent source of rights.

2. Proportionality merely expresses the criterion or factor for determining the reasonable or unreasonable — the equitable or inequitable — effects of particular geographical features or configurations upon a delimitation which would otherwise be indicated by the general configuration of the coasts of the Parties. Proportionality may appear in the form of the ratio between the areas of continental shelf to the lengths of the respective coastlines. But it may also appear, and more usually does, as a factor for determining whether an equidistance-line boundary is or is not reasonable or equitable in the particular geographical circumstances of a case.

3. Proportionality in the form of a ratio of coastal lengths is not a necessary adjunct of equity and is not therefore applicable in all cases: it may only be invoked when circumstances such as those recognized by the jurisprudence so require, as in the *North Sea Continental Shelf* cases.

4. Finally, even when it is relevant to the attainment of an equitable solution, proportionality does not take the form in which Libya envisages its application, that is, a strict ratio between the extent of the shelf and the length of the coastline. Proportionality "does not entail any nice calculations" as the Arbitral Court expressed the concept; and landmass is, of course, irrelevant.

When the present case is examined in the light of the propositions that have just been set out, it will be found that proportionality — in its true meaning and proper applicability — has no role to play in the delimitation of the shelf areas appertaining to Malta and those appertaining to Libya. The geographical setting is a perfectly regular one: two States face one another with absolutely no islands in between or any other features which could create an imbalance or a distortion. The differences between them generate by themselves a difference in the extent of the respective continental shelf areas and any further accentuation of such a difference would amount to a refashioning of geography.

Placed against this setting, the legal position that results is that of two natural prolongations extending seawards one towards the other: they meet and overlap and to conclude with the very words of the Judgment in which the notion of proportionality was first mentioned, they "can therefore only be delimited by means of a median line". There are no islands, rocks or other minor coastal projections creating disproportionately distorting effects; there are no markedly concave or convex coasts causing an imbalance; there are no irregular coasts which need to be reduced to their truer proportions; and there is no land boundary to complicate matters. There is only the sea, with its sea-bed and subsoil. That submarine area is the natural prolongation of both States and it belongs to both of them; but as these natural prolongations overlap they have to be divided. Of course, since Libya has a longer coast it will, by the mere seaward extension of that coast, retain a larger area that that which Malta by reason of its shorter coastline can retain; but there is no inequity in that natural division of the common areas that requires to be remedied. It is not true, as Libya contends in its sixth formal submission, that:

> "in the particular geographical situation of this case, the application of equitable principles requires that the delimitation should take account of the significant differences in lengths of the respective coastlines".

That difference in lengths of coastlines produces by itself a delimitation which takes account of the difference; but it does not require any further adjustments.

Any such adjustment would imply a refashioning of geography and if the adjustment were to take the form which Libya seeks to obtain from the Court, the refashioning would be such as to enclave Malta within an area even

smaller than would be justified by its existing fishing rights and extend Libya's continental shelf almost right up to the Maltese territorial waters : Malta
㊵ again invites the Court to look at the dossier, Figure 8, to see the effects of Libya's claim.

Libya has accused Malta of expecting a larger share of the limited shelf of the Mediterranean than its size warrants. As has been already pointed out, this is no legal argument; it is the argument flatly rejected by the Court of a sharing out according to size. But once the point has been made, Malta feels it ought to recall that nature has smiled upon Libya, both on land and in the sea, and both with respect to the extent of the areas over which it has jurisdiction and to the extent of the natural resources which those areas are known to contain; and this is what the present dispute is all about. Because of its geographical position, the configuration and length of its coastline, and particularly as it happens to be where the Mediterranean is at its widest, Libya can safely expect a substantial part of the continental shelf that is to be divided amongst the several litoral States without the need of looking for more. Compared to what other Mediterranean States will ultimately get, Libya is certainly not disadvantaged. Indeed it would be inequitable if Libya were to be
㊶ given more than what nature in its bounty has allocated to it. Figure 9 of the Maltese dossier shows the extent of the Libyan continental shelf if the Central Mediterranean sea-bed were to be divided on the basis of equidistance.

*The Court rose at 6.06 p.m.*

## TENTH PUBLIC SITTING (27 XI 84, 10 a.m.)

*Present:* [See sitting of 26 XI 84, Judge Lachs absent.]

The PRESIDENT: The sitting is open. Before calling upon Dr. Mizzi I have to announce that for personal reasons, duly explained to me, Judge Lachs will be absent from the hearing today.

### ARGUMENT OF MR. MIZZI *(cont.)*

AGENT FOR THE GOVERNMENT OF MALTA

Mr. MIZZI: Mr. President, Members of the Court, in my statement yesterday I recalled the main events in the history of the dispute which has brought the Parties before the Court, and I gave in that context a brief account of the conduct of the Parties, in so far as it is relevant to the decision of the Court.

I also indicated the main arguments on which the Libyan case rests; namely, the Rift Zone and proportionality, and I tried to show how the Rift Zone was seriously flawed, both in fact and in law, and why proportionality had no part to play in the present case.

I now come to the last part of my presentation in which I shall attempt to give, in very broad terms, more disposition with respect to the issues which the Parties have submitted for adjudication by the Court.

In rebutting the views expressed by Libya as to the principles and rules of international law applicable to the delimitation of the continental shelf and of the practical application of those principles to the present case, which are the substantial issues between the Parties, I have already recalled several of the views of the Republic of Malta on those issues. I shall therefore do my best to avoid repetition as much as possible. I do, however, beg the indulgence of the Court if some repetition will be found to be unavoidable.

The task of identifying the principles and rules applicable to the delimitation of areas of continental shelf claimed by two or more States has been eased considerably by the Court's Judgment in the *North Sea Continental Shelf* cases. Although the Court, in setting out those principles and rules, could not but have had very much in mind the special circumstances — indeed the very unusual circumstances — of those cases, the principles and rules identified by the Court in general terms appear to be of rather general application. They have in fact been substantially followed by the Court itself in the *Tunisia/Libya* case and by the Court of Arbitration in the Anglo-French case. In the *Gulf of Maine* case, the Chamber described the Court's decision in the *North Sea Continental Shelf* cases as "the judicial decision which has made the greatest contribution to the formation of customary law in this field"; and this description cannot but mean an endorsement of the principles and rules first enunciated by the Court in 1969.

The same may not, at least to the same extent, be said of the factors which the Court held that the Parties were to take into account in the delimitation of areas in the North Sea. These, in fact, appear to be conditioned by, and to relate particularly to, the very special circumstances of those cases. At the same time it would not appear correct to say that the factors indicated by the Court in those cases relate exclusively to them and may not have a wider application. A middle course appears to be the correct one to take. In other words, while the factors indicated by the Court may also find application in other cases, care must be taken not to mistake them for principles or rules or to extend their application to circumstances to which they do not, and were never intended to, apply.

Having made these preliminary observations, I can now pass on to a brief review of the Court's findings in 1969 and their applicability in the present case.

In the words of the Court's Judgment, the principles and rules of general application are:

> "(1) delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other;
>
> (2) if, in the application of the preceding sub-paragraph, the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally, unless they decide on a régime of joint jurisdiction, user, or exploitation for the zones of overlap or any part of them" (*I.C.J. Reports 1969*, p. 53, para. 101 (C)).

The first requirement, that delimitation is to be effected by agreement is satisfied, in the present case, by the undertaking contained in the Special Agreement to determine the boundary by an agreement in accordance with the findings of the Court.

Malta also accepts that the delimitation is to be effected in accordance with equitable principles, and taking account of all relevant circumstances. These principles, however, are not very easily ascertainable in practice. In fact, what constitutes or which are the equitable principles for the purposes of a delimitation of shelf areas has never been authoritatively defined; and it would be very presumptuous of me to try to do so. The Court did, in its 1969 Judgment, give some idea of what it meant by equity, but it did so more in a negative than in a positive manner, and in the context of cases in which the normal method of equidistance — as the Court accepted it to be — led to inequity in the special geographical circumstances of those cases. The Court did say, for example, that "Equity as a legal concept is a direct emanation of the idea of justice". But the two notions are often used interchangeably, and the one cannot be of much help for an understanding of the other.

Perhaps the notion of equity defies the precision of a definition; and one must be content with the various authoritative statements that have been made concerning it in the context of delimitation of shelf areas.

What appears to be less difficult to formulate is what equity is not or does not imply. Thus, equity does not justify a decision *ex aequo et bono*.

The equity that is to be applied in the determination of continental shelf boundaries is not equity outside the law. Equitable principles must be found within the legal framework applicable to the continental shelf and its delimitation. The division to be effected, therefore, is not a sharing out of areas on the basis of distributive justice.

In the second place equity does not necessarily mean or imply equality. As the Court explained, "natural inequalities" such as those resulting from one State having an "extensive coastline" and another State "a restricted coastline" cannot be remedied by equity (*I.C.J. Reports 1969*, pp. 49-50, para. 91). More generally the Court's position on this aspect is that "there can never be any question of completely refashioning nature" (*ibid*, p. 49, para 91).

To strike a more positive note, it may be said that equity is to be looked for in the result rather than in the means to achieve it. When it is achieved it is recognizable and accepted as such. But the means are not so readily identifiable; neither are the considerations to be taken into account. It is the result produced by a balancing-up of all such considerations that will determine the equitableness of the result; but equity does not itself provide the means to achieve it.

The process is not always as difficult as it may sound to be: there are cases where a single method, such as equidistance, will suffice; there are others where some adjustment to such a method will be sufficient to satisfy the requirements of equity. But there are then other cases where equity is very elusive.

It was in the context of such a situation that the 1969 Judgment indicated the factors which the Parties were to take into account in their negotiations. In fact the Court did so — as clearly stated in the Judgment itself — because, in view of the special circumstances of the North Sea delimitations, "equity excludes the use of the equidistance method in the present instance, as the method of delimitation" (*ibid.*, para. 90). Consequently the Parties could only obtain an equitable delimitation by taking various factors into account or by applying various methods.

In the particular instance of the North Sea delimitations the Court indicated three factors to be taken into account:

> "(1) the general configuration of the coasts of the Parties, as well as the presence of any special or unusual features;
>
> (2) so far as known or readily ascertainable, the physical and geological structure, and natural resources, of the continental shelf areas involved;
>
> (3) the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast measured in the general direction of the coastline, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitations between adjacent States in the same region" (*ibid.*, p. 54, para. 101 (D)).

The last two factors which the Court described in the terms I have just reproduced have already been considered at some length; and I do not intend to take any more of the time of the Court than is absolutely necessary to recall the main conclusions which Malta has drawn with respect to the geology and geomorphology of the shelf areas to be delimited, and to the test of proportionality.

On the geology and geomorphology of the region, Malta's position is that, apart from the consideration that in contemporary international law these elements are legally irrelevant, the scientific evidence shows that:

*(a)* the Pelagian Basin, of which the areas to be delimited form part, is a geological continuum; and

*(b)* neither the so-called "Rift Zone" in the Sicily Channel nor other areas of

> rifting, such as the Jarrafa Trough, disrupt the basic or essential unity of the Pelagian Basin;

and therefore the physical and geological structure of the areas involved are not even a factor to be taken into account; even if these elements had some relevance in contemporary law.

As to natural resources, and their presence in the shelf areas to be delimited, not enough is known to make this factor "readily ascertainable". The dispute before the Court has prevented the area from being properly surveyed and explored. From what is known, however, it may be said that if there is one area to which Malta can lay a claim that is more likely than any other to contain mineral deposits that area is to be found south of Malta, and more particularly in the vicinity of the equidistance line between Malta and Libya. Nothing will, of course, be known for a certainty before the two sides can tell which are the areas subject to their respective jurisdiction. But the Parties are before the Court because they are fairly confident that there are mineral deposits in the area and the likelihood of that presence increases as one moves further to the south of Malta.

For Malta, this factor is therefore of the utmost importance, since if Malta were deprived of any part of the areas to which it properly lays a claim it could happen that it will be deprived forever of the very possibility of owning its own resources.

On proportionality, Malta's position is that this factor only comes into play when the delimitation suggested by otherwise appropriate methods proves to be inequitable in view of the special or unusual circumstances of the case; and even when, in those circumstances, the test of proportionality becomes relevant, it does not take the form Libya has given to its version of proportionality. In other words all equity would require in such a case is "a reasonable degree of proportionality" and not a ratio of lengths of coastlines. In the present case, there is no inequity in a delimitation indicated by the method derived directly from the very concepts of equality of entitlements and non-encroachment, namely the method of equidistance whereby an equitable division of areas is obtained. Such a line would give full effect to the seaward reach of the opposite coasts according to their configuration, including their lengths which, by reason of their difference, generate a relative, but also substantial, difference in the extent of the areas allocated respectively to Malta and to Libya by a median line. There are no special or unusual features which could affect that line on grounds of equity; indeed any adjustment of that line coule not be done without a refashioning of geography.

It may therefore be said that neither of these two factors — physical elements and proportionality — are relevant in the present case.

The other factor mentioned by the Court is, on the contrary, one which is of a rather more general application, in the sense that a delimitation cannot be effected without regard being had to the general configuration of the coasts of the Parties and the presence or otherwise of special or unusual features.

Of course, when the Court directed the Parties in the *North Sea Continental Shelf* cases to take account of these considerations, the Court must have had very much in mind the special and quite unusual features of the coastlines of the Parties to those cases; and it would seem that the Court was referring to those particular features in its recommandations to the Parties. To the extent that this is so, also this factor would not be applicable to the present case since there are no "special or unusual features" "in the general configuration of the coasts of the Parties" in this case.

However, the geography of the region and the configuration of the coasts of the Parties, even when they are simple and normal as they are in the present case, are not just relevant to the delimitation of the areas of shelf comprised within those coasts: they contain the key elements of the framework in which the delimitation can properly be effected.

These considerations have been amply discussed in Malta's written pleadings and will again be presented by my colleagues to the Court. I shall therefore limit myself to recalling the key elements of the present case in summary form. These are:

*(a)* the coasts of Malta and Libya are opposite and are set at a considerable distance from each other;

*(b)* there is an absence of intervening islands or other unusual features and the relationship of the Maltese and Libyan coastlines is remarkable only in terms of its normality;

*(c)* the primary elements of the geographical facts are uncomplicated and consequently each pertinent coast should be given its appropriate legal significance on the basis of the distance principle and the use of controlling basepoints.

Apart from the factors set out by the Court in 1969, no authoritative list exists of the relevant circumstances which are to be taken into account in drawing maritime boundaries; but there should be little doubt that the number of such circumstances is not a restricted one, their relevance of course being a matter for evaluation in the light of all the circumstances taken together.

In its written pleadings Malta has indicated what it believes to be relevant circumstances in the present case. In this context, the expression "relevant circumstances" is intended to refer to those circumstances which are not the key elements of the case rather than to all the circumstances lumped together; and this is why Malta has referred to them as the "Other Relevant Factors". It is, in any case, to these circumstances that I am now referring.

Two of these circumstances are very much connected with the process of delimitation. These are: the conduct of the Parties and delimitations with third States. The others affect more directly the entitlement of Malta to its continental shelf and the need to protect the sea and land territory subject to its jurisdiction. These are: security interests, particularly for neutral States; and economic and related factors, especially in the case of island-developing States.

I shall not be dealing with these matters in any more detail than I have already done with respect to the conduct of the Parties and delimitations with third States. These aspects, as well as the other relevant circumstances I have just recalled, will be treated more comprehensively by my colleagues. I also do not wish to stray too much away from the main line of Malta's position on the legal principles and rules applicable to delimitation in the present case. I do, however, wish as Agent of the Republic of Malta, to stress the importance Malta attaches to its security interests. Indeed, as a neutral State Malta has a special duty to protect and defend those interests. There is no difference between the Parties as to the relevance of security interests; nor could there reasonably be any, since security was one of the vital considerations which prompted the Truman Proclamation and is still a key element of continental shelf rights. There is however a difference of approach since even in this context Libya claims greater security needs and tries to switch Malta's needs to one direction only, that is, away from Libya. I shall not stress the obvious, namely, that the security interests of States are equal and that an island's security needs are all seawards and face all directions, but I shall recall once more that Libya pushes its claims almost right up to the territorial waters of Malta and the northern border of its "Rift Zone" encroaches even on that part of the Maltese territory. Malta cannot but be, to put it mildly, disturbed by this approach.

Mr. President, the requirement of taking into account all the relevant circumstances is an essential element of the principle that delimitation is to be effected in accordance with equitable principles, taking account of all relevant circumstances. This principle, which is fundamental to all delimitations of continental shelf, owes its judicial affirmation to the Court's 1969 Judgment. That Judgment has also authoritatively indicated the result which the application of that principle must bring about. In the words of the Court, the application of equitable principles and the taking into account of relevant circumstances, must result in each Party being left with "as much as possible" of "all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea". The same result is also formulated by the Court in a negative form, as if to emphasize the importance of this concept: and its says the delimitation must be effected "without encroachment of the natural prolongation of the land territory of the other".

The application of this principle in cases of adjacent coasts often creates difficulties mainly because the encroachment is a frontal one and, not infrequently, has a cutting-off effect. But in the case of opposite States, the contrary is the rule. This is particularly true when there are "no islets, rocks or other minor coastal projections which could have a distorting effect" and where the distance between the opposite coasts is significant. In such cases, the overlap is relatively equal and at some distance from the two coasts; and there is normally no cutting-off effect. To borrow again from the Court's Judgment of 1969, which emphasized — and not without reason — the distinction between adjacent and opposite coast:

> "The continental shelf area off, and dividing, opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delimited by means of a median line." (*I.C.J. Reports 1969*, p. 36, para. 57.)

This is in fact the only way in the case of opposite States standing in a relationship of normality with one another in which each State can be left with maximum areas of its natural prolongation and with minimum encroachment by the other State. It is also the only method which results in an equitable division of the areas.

When in the *Tunisia/Libya* case the Court had reached a point in the delimitation between the two States in which Libya and Tunisia became very nearly opposite States, the Court — though giving only partial effect to the Kerkennah Islands — established an equidistance line between the two almost opposite coasts.

The delimitation established by the Court of Arbitration in the Anglo-French case departs from equidistance only with respect to the Channel Islands in view of their very particular position on the wrong side of the median line and — in order to give a half effect to the Scilly Isles in view of their distorting effect on an otherwise equitable equidistance line dividing the shelf between two laterally related coasts.

In the *Gulf of Maine* case, subject to an adjustment which the Chamber felt was necessary in the special circumstances of the case, and which related to areas where the coasts were lateral or adjacent, the Chamber expressly recognized that in a geographical situation of opposite coasts

> "the application of any method of geometrical origin, no matter which, including that propounded in paragraph 1 of Article 6 of the 1958 Convention, can in practice only result in the drawing of a median delimitation line" (para. 216).

This is also in Malta's view the only practical way in which the principles and rules of international law may be applied in the present case. The logic of this conclusion is confirmed by the second paragraph of the Court's *dispositif* in the 1969 Judgment quoted above. It is there expressly provided that where there is an overlap of natural prolongations — that is, of entitlements — that overlap must be divided either as the Parties may agree or, failing agreement, "equally". In this context "equally" does not necessarily mean equal parts. The equality which is clearly intended by the Court is relative equality, dependent mostly on the configuration of the coastlines, including their length. In fact the Court uses the term equality in the context of two natural prolongations extending one towards the other and meeting in the middle; and it is clear, therefore, that the equality the Court refers to is an equality of distance; and equality of seaward reach of the two coasts; and equality which permits the configurations of the two coastlines to generate their appropriate extent of continental shelf rights.

By stating what should be done when two entitlements claimed by opposite States meet and overlap, the Court has also indicated the practical way in which the principles and rules of international law are to be applied to a delimitation which is unaffected by special or unusual features and, of course, when the Parties cannot agree on where to draw the boundary line. The areas which overlap must be divided by a line which, in order to respect as fully as is practicable the natural prolongations of both States, and without encroaching on the natural prolongation of the other, must be mid-way between the relevant basepoints on their coastlines.

In support of the equitableness of this conclusion Malta has shown that this practical method has been accepted and acted upon by a very large number of States in comparable situations as reflected in the various delimitation agreements to which Malta has made reference in its written pleadings. The importance of State practice lies in the fact that it is inconceivable that a method so often used by States to determine the boundaries of their jurisdiction over such vital matters as sovereignty and natural resources should not, as a rule, be equitable.

It is true of course that no two situations are identical; but it is equally true that many situations are comparable; and Malta believes to have shown — and will confirm this evidence further during these proceedings that in most, if not all, comparable situations States have adopted or relied on equidistance. This practice cannot but mean a general acceptance by States that a delimitation based on equidistance is, as a rule, equitable. Where it is not, this is because of the special circumstances of the case, in most cases the geographical configuration of the coastlines in relation to the area to be delimited. Of course in such cases resort must be had to an abatement, or only partial application of that method, or even an outright exclusion of that method and the adoption of another, or a combination of methods. But in the absence of these circumstances — and Malta believes that such is the present case — equidistance is the method States have most frequently adopted.

Libya unwillingly accepts these facts, because they are undeniable. It has, however, played down the role of equidistance in State practice and has inflated out of all proportion any slight deviation from it. It has also in a number of cases tried to show — which is very often not the case — that the delimitations related to coasts whose difference in lengths was not very marked. These are, however, matters of detail and it is not proposed to deal with such matters at this stage. Like several other matters I have touched upon in my statement, State practice and its importance in the present case, whether with reference to the wide use of equidistance as a method of delimitation or with reference to the irrelevance for the purposes of delimitation of the difference in the lengths of coastlines and of the geology and geomorphology of the sea-bed, will be discussed more fully by my colleagues during the coming days.

They will show amongst other things that —

- State practice contradicts both arguments on which Libya's case mainly rests, namely —
  - *(a)* that geological and geomorphological features control the delimitation of continental shelf boundaries, and
  - *(b)* that proportionality is a determinant factor in the delimitation process;
- on the contrary, State practice supports the equidistance method as the one which is, in most cases, the equitable and therefore the appropriate method, whether or not some slight modification or adjustment may, for special reasons, be indicated.

My colleagues will also show that there is no foundation, indeed no truth, in Libya's allegation that there has been a "trend away from equidistance" since the Court's Judgment in the *North Sea Continental Shelf* cases. When States have departed from the method of equidistance they did so for reasons which have nothing to do with that Judgment. In fact, as has been shown in Malta's written pleadings, the percentage of agreements which have relied on equidistance as against those that have not, has been higher since 1970 than it was before 1969. This is eloquent evidence that if one were to speak of a trend, this trend has been towards and not away from equidistance.

The Libyan conclusion is a further demonstration of the Libyan misinterpretation of the Court's 1969 Judgment. That Judgment did not in any way discredit equidistance; it simply held that in the special circumstances of three adjacent States in which one of them was hemmed in by the other two, equidistance could not be the sole method of delimitation — not that it was not an appropriate method — but could not in those circumstances be the sole method of delimitation.

As the Court may have noted, I have referred to the Judgment in the *North Sea Continental Shelf* cases more than to any other judicial pronouncement, and I have also quoted from it more extensively than from any other source. I have done this with a purpose. As the Chamber in the *Gulf of Maine* case has recently recalled, the 1969 Judgment has made the greatest contribution to the formulation of the law on the subject; and that fact is by itself sufficient to explain why I have resorted to that Judgment more than to any other decision. But I also wanted to bring out the fact that the 1969 Jugdment, which Libya considers to have discredited equidistance, has done nothing of the kind.

That Judgment merely stated that the equidistance method was not mandatory under customary international law and that in the special circumstances of the cases before the Court it could not be applied as the sole method of delimitation. It fully recognized, however, that in most cases equidistance was quite appropriate and, indeed, that as between opposite States it was the only possible method, except where special circumstances otherwise demanded.

The 1969 Judgment, therefore, fully supports Malta's position with respect to Libya, where the case is one of opposite States in a setting undisturbed by abnormalities.

At the same time I believe to have also shown that Malta's position is equally supported by the other judicial or arbitral decisions, namely, the Judgments in the *Tunisia/Libya* case and in the *Gulf of Maine* case, and the decision of the Court of Arbitration in the Anglo-French case.

The validity of equidistance as an equitable method of delimitation in a large and varied number of cases is further confirmed by State practice. State practice shows, beyond doubt, that equidistance is not just the simplest method but is also, in most cases, the more equitable. It is also the most adaptable to the variations and adjustments which might be necessary in view of the special geographical situations of particular cases. It may, in fact, be said that the slight adjustments or variations to which the method has been subjected both by the courts and by States, have, rather than discrediting, enhanced the validity, importance and adaptability of this method.

In the present case it is Malta's submission that equidistance is the method most appropriate for the delimitation of the shelf areas appertaining to Malta and Libya respectively. This method reflects the conduct of the Parties at least between 1965 and 1973; it gives appropriate and just weight to such important relevant circumstances as the equal need of both States to protect their security interests and to meet their economic and related requirements; above all, equidistance respects, more than any other method, the geographical circumstances of the present case and the consequential entitlement of the two States to continental shelf areas as generated by the configuration of their respective coasts, including of course the lengths of those coasts.

In conclusion I may assert, with confidence, that —

(i) the principles and rules of international law applicable to the delimitation of the areas of the continental shelf which appertain to Malta and Libya are that the delimitation shall be effected on the basis of international law in order to achieve an equitable result;

(ii) in practice, the above principles and rules are applied by means of a median line every point of which is equidistant from the nearest points on the baselines of Malta, and the low-water mark of the coast of Libya.

Mr. President, distinguished Judges, I have come to the conclusion of my statement. Before leaving the rostrum, however, I wish to give to the Court, and to our friendly opponents, an indication of the distribution among counsel of the various aspects of Malta's case.

Mr. Elihu Lauterpacht will start with the Special Agreement that has brought the Parties before the Court, and the task of the Court. He will then deal with the physical facts of the case, with particular reference to the Libyan presentation of those facts. He will also discuss State practice in relation to equidistance, geography and the problem of third States and non-geographical relevant factors.

Professor Weil and Professor Brownlie will examine the major legal issues which divide the parties. Professor Weil will discuss, in particular, the process of delimitation, natural prolongation, distance and equidistance; while Professor Brownlie will examine the question of lengths of coasts and territorial magnitude, and that of proportionality.

Mr. Lauterpacht will then sum up the case for Malta and I shall conclude the first round for Malta with a few words.

Mr. President, I have finished. May it please the Court to call on Mr. Lauterpacht. I thank you all.

The **PRESIDENT**: Thank you, Dr. Mizzi. I now call upon Mr. Lauterpacht.

## ARGUMENT OF MR. LAUTERPACHT

COUNSEL FOR THE GOVERNMENT OF MALTA

Mr. LAUTERPACHT: Mr. President and Members of the Court, may I begin by expressing my pleasure and sense of privilege at once again appearing before you.

You have just heard a clear and compehensive re-statement of Malta's case presented by the Agent for Malta. Certainly the view could be taken that Malta might conclude its oral argument with that statement. It has dealt concisely and succinctly with the principal elements of the case — already so fully canvassed in the written pleadings. One might indeed say, that after such an overture who needs an opera. On the other hand, the view might be taken that, because the Statute contemplates a stage of oral proceedings, respect for the Court requires that each side present a statement of its case which goes beyond a summary recapitulation of its written position. It is, therefore, in accordance with that view that counsel for Malta now seek to develop their case in a way that they hope will, even at this juncture, provide the Court with further assistance.

It falls to me to deal first with a preliminary question, namely, the task of the Court in the light of the Special Agreement. After that I shall go on to certain substantive aspects of the case, which I shall outline in more detail after dealing with this first subject.

Permit me, therefore, to begin with some reference to the nature of the task before the Court. On this matter, the Parties appear to disagree on one question and almost to agree on another. The question on which they disagree is that of the degree of particularity with which the Court should express its conclusions regarding the questions put to it in the Special Agreement. The question on which the Parties largely agree is that of the relationship between the claims of third parties and the content of the Court's judgment.

May I speak first of the question on which the Parties disagree. It is this: how precisely should the Court describe the consequences which will flow from its treatment of the substance of the case?

Malta has expressed its view of the task of the Court in the Memorial in the following words:

The task,

> "is to identify the principles and rules of international law applicable to the delimitation of the continental shelves of the two Parties with effectively the same degree of particularity as those principles were identified in the *Tunisia/Libya* Judgment. The Court should indicate the boundary which, in its view, would result from the application of such method as the Court may choose for the Parties to achieve the relevant determination." (I, MM, p. 11, para. 22.)

Libya, however, is evidently apprehensive about the prospect of the Court stating its conclusions so precisely. It is worried, to use the words of the Libyan Reply, lest

> "The Court . . . conceive its role as prescribing for the Parties a single method of delimitation having the degree of precision of, for example, the equidistance method."

The Libyan reply continues:

> "Libya dissents from such a view, for it would leave to the Court virtually no choice at all other than to sanction the application of a pre-ordained method, such as Malta's application of equidistance." (*Supra*, LR, para. 1.05.)

Malta submits that this apprehension on the part of Libya is misconceived. It is, of course, true that in the present case Malta sees an application of equitable principles reaching an equitable result as involving the use of equidistance. This is a matter which I shall develop further when I turn to the substance of Malta's case. But it remains a fact that Libya has rejected equidistance in favour of resting the whole of its case on the proposition that the Court should discharge its task by declaring that the line should fall "within, and following the general direction of the Rift Zone". Malta's submission is that there is nothing in the situation which obliges, or entitles, the Court to reach so vague and general a conclusion as that advocated by Libya.

For this submission there are two reasons: first, it must be borne in mind that a conclusion expressed even word for word in the terms of Libya's final conclusion would not in practice satisfy the terms of the Special Agreement.

What is Libya's contention? I read from Libya's ninth submission, which appears in identical terms in its Memorial, Counter-Memorial and Reply:

> "The principles and rules of international law can in practice be applied by the Parties so as to achieve an equitable result, taking account of the physical factors and all the other relevant circumstances of this case, by agreement on a delimitation within, and following the general direction of, the Rift Zone as defined in the Libyan Memorial."

With this must be compared the relevant words of the Special Agreement, namely, the second phrase of Article I (**I**, p. 5):

> "The Court is requested to decide . . . how in practice such principles and rules can be applied by the two Parties in this particular case in order that they may without difficulty delimit such areas by an agreement as provided in Article III."

I am bound to draw attention particularly to the words "without difficulty". Libya's ninth submission, when using the words "can in practice be applied by the Parties" makes no mention of the requirement that the principles and rules should be such that they may be applied "without difficulty". Yet these words would not have been inserted in the Agreement if the Parties had not intended that they should introduce into the case some identifiable element of ease.

One thing, however, is plain beyond the need for elaboration. It is that a direction by the Court which instructs the Parties, without more, to draw a line "within, and following the general direction of, the Rift Zone" would be a prescription for continuing difficulty and tension. It would in no way advance the settlement of the dispute between the two countries. There would be room for disagreement upon two major categories of points:

First, what is the "general direction" of the Rift Zone "as defined in the Libyan Memorial". The range of possibilities is evidently large. The Rift Zone, as illustrated by Libya, is an extensive area and it does not run in one direction only. The clearest depiction of the concept appears in Figure 4 of the Libyan Memorial, page 132. The Court can readily see the scope that exists for argument about the question of "general direction".

Second, there would also be room for argument as to how far any line should run and as to the points at which it should turn and terminate.

The Court will bear in mind that the Libyan proposal of April 1973, which was described in paragraph 4.34 of the Libyan Memorial (I) and is depicted in Figure 1 of Malta's dossier, is a line which is constructed on the basis of proportionality — as conceived at that time by Libya. Libya has in no way receded from its contention that proportionality remains relevant and has, indeed, gone so far as to argue that a Rift Zone line satisfies the test of proportionality.

This being so, it is evident that if the Court should, for example, accept the idea of some Rift Zone line and then leave it to the Parties to reach an agreement on so general a basis, Libya is likely to seek to introduce into the construction of that line the changes in direction — no less than nine in number — which may be perceived in the line which it proposed in 1973 as a line of proportionality. And those nine changes of direction may be seen in Figure 1. Such a proposal would clearly be one productive of controversy. It is to guard against that kind of risk that the Court should establish with a much greater degree of precision than that for which Libya contends, the elements which the Court considers should be taken into account in the construction of the line.

I turn, Mr. President, to the second reason why the Court should not accept the Libyan invitation to limit its task to the kind of general identification contemplated in the ninth Libyan submission. The Court will bear in mind the point already made in Malta's pleadings, especially its Memorial, that there is a close similarity between the Special Agreement in this case and the one in the *Tunisia/Libya* case which was the subject of the Court's Judgment of 1982. The *dispositif* of that Judgment stands, in the submission of Malta, as a precedent for the kind of way in which the Court should approach its task in this case. (In saying this, of course, I need hardly add that I am in no way commenting on the recent Tunisian Application for interpretation of the 1982 Judgment.)

The *dispositif* of the 1982 Judgment is divided into three sections. In the first, section A, at page 92, the Court states the applicable principles and rules for the delimitation; in the second section, B, at page 93, the Court identifies "the relevant circumstances to be taken into account in achieving an equitable delimitation"; and in the third section, C, at pages 93 to 94, the Court sets out in detail the "practical method for the application of the aforesaid principles and rules of international law in the particular situation of the present case". There then follows, in some detail, a description of the two sectors into which the Court divided the area of delimitation, and as the Court said: "each requiring the application of a specific method of delimitation in order to achieve an overall equitable solution".

The justification for this degree of precision is demonstrated with striking force by one passage in Judge Schwebel's separate opinion in the recent *Gulf of Maine* case. The Court will recall that the operative part of the decision of the Chamber, defining precisely the course of the single maritime boundary, was adopted by four votes to one, including the vote of Judge Schwebel. Nonetheless, he delivered a separate opinion in which he indicated clearly that he would have identified a different line — not radically different, but somewhat different. The way in which Judge Schwebel explained why he was prepared to set aside his preferred conclusion in favour of the one which attracted the support of the other three majority Members of the Chamber is particularly relevant here and with your leave, Mr. President, I should like to read to the Court the relevant but brief passage in Judge Schwebel's separate opinion.

After stating that he has voted for the Chamber's Judgment because he was generally in agreement with its reasoning, he added this further reason:

> "because I recognize that the factors which have given rise to the difference between the lines are open to more than one legally — and certainly equitably — plausible interpretation . . .
>
> On a question such as this, the law is more plastic than formed, and elements of judgment, of appreciation of competing legal and equitable considerations, are dominant. It is easier to criticize than to construct . . . While I am convinced of the equity of my conclusion, nevertheless I am not prepared to maintain that the Chamber is necesssarily wrong and that the line which its position on the test of proportionality has produced is inequitable. On the contrary, it is to be expected that differences of judgment on the application of equitable principles will arise, which at times may not admit of confident conclusions of law." (*I.C.J. Reports 1984*, p. 357.)

Now, Mr. President, that passage recognizes very clearly that in a situation where the relevant circumstances were established virtually to the point of agreement, there could still be good faith doubt about their reflection in terms of a specific boundary line. If, therefore, the terms of the Special Agreement in the present case are to be satisfied, it is clear that something a good deal more exact is called for than the very general conclusion advocated by Libya.

To conclude this consideration of the task of the Court, I may mention the aspect on which the Parties appear to be in agreement, namely, the relationship between the Court's Judgment and the position of third States, and for all practical purposes this means the position of Italy.

The Libyan position in this regard is stated in its Reply, paragraphs 1.06 and 1.07. There it says:

> "the task entrusted to the Court can lead to a judgment which, . . . should extend to all the areas of continental shelf relevant to a delimitation between Libya and Malta" (*supra*, LR, para. 1.06).

Malta agrees with this statement.

But Malta does not agree with the statement which follows in the next paragraph (para. 1.07) of the Libyan Reply, which is to the effect that a distinction may have to be made between that part of the area in which there are no claims by third States, and that part or parts in which there is such a claim.

Malta does not believe that the application by Italy to intervene in the present proceedings should be permitted to complicate the task of the Court or of the Parties. The basis of the Court's jurisdiction in this case is the Special Agreement and the limits of the Court's task are set by that agreement. The situation contemplated by that article is essentially and exclusively a bilateral one between Libya and Malta. These States, being Parties to the Special Agreement, have the right to ask the Court to identify the principles and rules of international law applicable to the delimitation of the continental shelf boundary throughout its length between them. The fact that a third State may make a claim which touches part of the area affected by the bilateral delimitation is quite irrelevant. With the greatest of respect, not only to the Court as a whole but also to its individual Members who expressed a variety of differing opinions in relation to the intervention proceedings earlier this year, I must stress this point.

It is an unquestionable rule of law — enshrined indeed in the case law of the Court as well as the relevant convention that two States sharing a common continental shelf delimitation problem are entitled to proceed to a bilateral delimitation by means of a negotiated treaty. There is no rule of law which says that they must take into account between themselves the claims, actual or potential, of third States. If they reach an agreement which a third State believes affects its interests adversely, that third State may negotiate with each or both of the contracting States, as circumstances require. That, indeed, is precisely the situation which Italy and Tunisia created when they agreed upon their continental shelf boundary in the area of Lampedusa, Linosa and Lampione — an area which, as one independent and careful author has put it is "located in maritime space that seemingly should be divided between Tunisia and Malta" (Karl, "Islands and the Delimitation of the Continental Shelf", 71 *American Journal of International Law*, 642, 647 (1977)). Malta's rights having been affected by this settlement between Italy and Tunisia, it is now up to Malta to resolve the matter with each or both of those countries.

It is also the situation — as is less frequently recalled — that obtained between the Federal Republic of Germany, on the one hand, and Denmark and the Netherlands respectively, on the other, as a result of the conclusion on 31 March 1966 between Denmark and the Netherlands of the agreement by which those two States established an equidistance boundary between them in areas of the North Sea to which the Federal Republic of Germany laid claim (see *I.C.J. Reports 1969*, pp. 14 and 18). Subsequently, in the light of the Court's 1969 Judgment, the Federal Republic negotiated an adjustment of the boundary with each of the other two States.

If that is the position in relation to treaty settlements, it can be no less so in relation to judicial settlement. The duty of the Court (as, with respect, I understand it) is to aid the actual Parties to the dispute which has been submitted to it to resolve their differences. And if in so doing it takes into account what are no more than claims by third parties, then it steps outside the jurisdiction conferred upon it by the Parties.

It is, of course, understandable that the Court would not wish to be seen as doing anything which specifically and absolutely prejudices the rights of third States.

Those rights — such as they may be — can adequately be safeguarded by adherence to the approach which the Court set out in its Judgment of 21 March this year; there, at pages 26 and 27 the Court said, speaking of the judgment that it will give in this case:

> "The future judgment will not merely be limited in its effects by Article 59 of the Statute: it will be expressed, upon its face to be without prejudice to the rights and titles of third States."

By using words such as these, the Court may, in Malta's submission, quite properly answer the questions put to it in Article I of the Special Agreement with regard to the whole of the line necessary to divide the area of continental shelf appertaining to the two Parties respectively.

It will, of course, then be necessary for Libya and Malta to negotiate an agreement "in accordance with the decision of the Court" — as is prescribed in Article III of the Special Agreement. At that time, Italy will, of course, be fully entitled to invite either or both of the Parties to negotiate with it on the boundary of those parts of the continental shelf which it may claim to affect it; and Italy will be equally free to propose that if any dispute remains unresolved it should be submitted to this Court. It is only at that stage, if it is ever reached, and not before, that the Court may properly assess the nature and extent of Italy's claims vis-à-vis Libya and Malta.

*The Court adjourned from 11.15 a.m. to 11.30 a.m.*

Mr. President and Members of the Court, I turn now from the task of the Court, conceived in terms of the Special Agreement, to another important threshold question, namely, that of the task of the Court conceived in the terms of application of law.

The question is: what is the basic rule of law applicable to this case? In answering this question, the Parties have shown a similarity of approach. Both have referred to the role of the Court as being to apply equitable principles in order to achieve an equitable result.

The double-barrelled invocation of the word "equitable" in relation to the performance of a judicial function based, as Article 38 of the Statute reminds us, on the application of law, requires a moment's consideration, even in front of the very Court whose own jurisprudence has made the dominant contribution to this concept of "the application of equitable principles leading to an equitable result".

I venture to embark upon this consideration because there are, I shall submit, two important elements which need to be borne in mind:

The first is that if an equitable result is to be pursued through the channel of the application of equitable principles, the factors or circumstances relevant to that pursuit cannot be limited to those which are exclusively physical in nature — whether geographical, geological or geomorphological. Equity is not a matter that can be determined through blinkers or shutters. Equity involves taking a view of the matter as a whole by reference to every factor which is adduced as bearing on the fairness, reasonableness or justice of the result.

The second element which bears re-statement is that, notwithstanding the latitude with which the formula of what I may call for convenience the "equitable principles/equitable results" concept vests the Court, it is nonetheless important to note the existence and character of State practice relevant to the problem.

So having stated why in my submission it is pertinent to examine the meaning of the "equitable principles/equitable results" doctrine, I should like, Mr. President, with your leave, briefly to recapitulate its judicial history. I realize that no one is better acquainted with this history than are the Members of this Court. Nonetheless I hope that you will bear with me while I seek to recall two things: first, that we are dealing with equity within the framework of law; and second, that as initially conceived, and even as subsequently applied, the concept of equitable principles does not involve any arbitrary or artificial restriction of relevant equitable factors.

The starting point is, of course, the Court's Judgment in the *North Sea Continental Shelf* cases.

The first mention of "equitable principles" appears in paragraph 55 of the Judgment when, in a passage where the Court was dealing with the evolution of Article 6, paragraph 2, of the 1958 Continental Shelf Convention, the Court stated in the broadest terms that "current legal thinking" was and remained "governed by two beliefs", of which one was that delimitation should be effected on "equitable principles". Interestingly enough, the Court cited no specific source for the origin of this important concept.

The next mention of "equitable principles" appears in paragraph 85 of the Judgment which, relying on the observations (such as they were) in the earlier paragraph, asserted the existence of "certain basic legal notions", of which the first was that delimitation must be the object of agreement and "that such agreement must be arrived at in accordance with equitable principles".

Thus far nothing had been said in the Judgment about the content of these "equitable principles". However, in paragraph 85 *(b)* the Court came to the point by saying: "the parties are under an obligation to act in such a way that, in the particular case, and taking *all* the circumstances into account, equitable principles are applied" (emphasis added). Admittedly, this sentence does not actually state what an equitable principle is, but it does provide guidance as to how the concept operates by stating unequivocally that in the particular case all the circumstances must be taken into account.

Shortly afterwards, when affirming in paragraph 88 that "it is precisely a rule of law that calls for the application of equitable principles", the Court gave another indication of the breadth of considerations which should determine the content of any particular delimitation:

> "It must however be noted that the rule [the rule of equity] rests also on a broader basis. Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable."

The reference here to the word "just" is important because, once again, the criterion is stated in broad terms without any qualification and this approach is maintained in a passage which, though often cited, has sometimes not been appreciated in its full significance. It appears in paragraph 91:

> "Equity does not necessarily imply equality. There can never be any question of completely refashioning nature . . . Equality is to be reckoned within the same plane, and it is not such natural inequalities as these [i.e., absence of access to the sea or unequal length of coastlines] that equity could remedy."

Now, the important point to observe is that the sentence which I just quoted reads: "Equality is to be reckoned within the same plane." It does not read: "Equity is to be reckoned within the same plane." In other words, the Court was not saying that the equities of the situation had to be assessed exclusively in terms of geographical inequalities. "Equity" was conceived of as being a broader concept.

And this is clearly shown when one turns to the next two paragraphs, 92 and 93. There the Court first said that "the problem is one of defining the means whereby the delimitation can be carried out in such a way as to be recognized as equitable" and then it went on to state in paragraph 93:

> "In fact, there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures, and more often than not it is the balancing-up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case."

Accordingly, in the next paragraph (para. 94) the Court identified as some of the aspects to be taken into account, the geological, the geographical and "the idea of the unity of the deposit".

Finally, in paragraph C, 1 of the *dispositif* the Court referred to the need to take into account "all relevant circumstances".

In concluding these references to the *North Sea Continental Shelf*, it is interesting to note that despite the fact that the Court discussed specifically the application of "equitable principles", it did not more than allude, virtually incidentally, to the purposes of such application. Evidently the Court assumed that the transition from "equitable principles" to an "equitable solution" was self-evident, for the only reference made to the solution was in paragraph 92 where the Court spoke of "results" in the following terms:

> "it is necessary to seek not one method of delimitation but one goal. It is in this spirit that the Court must examine the question of how the continental shelf can be delimited when it is in fact the case that the equidistance principle does not provide an equitable solution."

Now, Mr. President, I turn from the *North Sea Continental Shelf* cases to the Anglo-French Continental Shelf case, which built on and added to the *North Sea Continental Shelf* Judgment in some helpful respects.

First, it provided for the first time a synonym, other than the word "reasonable", for the expression "equitable character". At paragraph 84 the decision spoke of "the appropriateness — the equitable character — of the method". Now this identification between appropriateness and equitable character, almost casual, but for all that the more striking, lies at the heart of the matter. It shows that "equity" in this context is not a technical concept but is equivalent to "appropriateness" and hence may be identified with other comparable terms such as justness, fairness or reasonableness. All of these are large concepts, the application of which is not restricted by any arbitrary exclusion of specific classes of consideration.

Second, going on now with the Anglo-French decision, the Tribunal when considering by reference to equitable considerations the effect of the Channel Islands upon delimitation, introduced into its analysis a number of factors, like the following: the political relation of the islands to the United Kingdom (para. 183); the limits of the territorial seas and the coastal fisheries of the two sides; the potential of an extension of the territorial sea of the islands from 3 to 12 miles (para. 187); navigation, defence and security interests, as well as "geographical, political and legal circumstances of the region" (para. 188).

I pass from the Anglo-French case to the Court's own Judgment in the *Tunisia/Libya* case. The particular significance of the Judgment in the present context lies, first, in the express acknowledgment of the unsatisfactory nature of the use of the word "equitable" as qualifying both "principles" and "result" in the "equitable principle/equitable solution" context. The Court said:

> "The result of the application of equitable principles must be equitable. This terminology, which is generally used, is not entirely satisfactory because it employs the term equitable to characterize both the result to be achieved and the means to be applied to achieve this result. It is, however, the result which is predominant; the principles are subordinate to the goal." (Para. 70.)

Next, the Judgment is of value for the emphasis which it lays on the association between "equity" and "justice". "Equity" says the Court, "as a legal concept is a direct emanation of the idea of justice" (para. 71).

However, in paragraph 107 of the Judgment, the Court stated that it could not take into account economic factors to which both Parties had referred in their pleadings. I respectfully submit that the Court should not lose the present opportunity to clarify the scope of this paragraph. Malta contends that this paragraph need not and should not be read as a total exclusion of the relevance of economic considerations to the determination of an equitable result. For one thing, such an exclusion would run counter to the whole philosophy underlying the concept of an equitable solution. An equitable solution is one which is fair, just, reasonable or appropriate by reference not to some arbitrary selection of factors but by reference to all circumstances which could influence an objective observer in assessing the merits of the situation. To exclude economic factors when, as is evident virtually beyond the need for reassertion, the present case is one about access to economic resources and nothing else, would be to exclude the single most relevant consideration.

No less to the point, the words actually used by the Court in the *Tunisia/Libya* Judgment do not need to be read as excluding the relevance of economic considerations in the present case.

The Court appears to have been influenced by the view that the considerations invoked in that case were "variables which unpredictable natural fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other". "A country", said the Court, "might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource." However, the facts of the present case do not bring it within the area of unpredictability contemplated in these lines. It is a fact that in resource terms Malta is poor and that unless the resources believed to lie in the area embraced particularly in the southern part of Malta's claimed area are developed for the benefit of Malta, its resource position is unlikely to change significantly. It hardly needs to be said that Libya is in a totally different position. It has vast onshore resources. It is already developing its offshore resources both in the area of its continental shelf identifiable as a result of the 1982 Judgment, and in the area lying to the south of Malta's claimed line. In addition, of course, there are substantial offshore resources to the east of the area affected by the delimitation with Malta. There is nothing to stop Libya making use of the revenue from these resources over their foreseeable life-span so as to develop and diversify its economy and thus eliminate the structural weaknesses in it which Libya has mentioned in its Counter-Memorial. Little such opportunity is open to Malta; the main elements in its economy are tied to activities which are much more exposed to the adverse consequences of recession in other countries than is the sale of oil on the scale which is open to Libya, even in the harshest of times.

Turning, Mr. President, from the *Tunisia/Libya* case to the next case, it is appropriate to pass to the Judgment of the Chamber of the Court in the *Gulf of Maine* case. This contains what the Chamber described as a "more precise reformulation" of the relevant rules in the following terms:

> "delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result" (para. 112 (2)).

For present purposes what matters are the closing paragraphs of the Judgment, from paragraph 232 onwards.

In dealing with the third, or outer, segment of the line, the Chamber acknowledged that this segment is "the one of greatest interest to the Parties, on account of the presence of Georges Bank". It was the real subject of the dispute "from the viewpoint of the potential resources of the subsoil and also, in particular, that of fisheries that are of major economic importance" — those are the words of the Chamber. Accordingly, the Chamber continued:

> "Some enquiry whether, in addition to the factors provided by the geo-

> graphy of the Gulf itself, there are no others that should be taken into account, is therefore an understandable step. It might well appear that other circumstances ought properly to be taken into consideration in assessing the equitable character of the result produced by this portion of the delimitation line, which is destined to divide the riches of the waters and shelf of this Bank between the two neighbouring countries." (*I.C.J. Reports 1984*, p. 340, para. 232.)

"These other circumstances" said the Chamber, consisted of the data on "human and economic geography": and the Chamber said, such data may:

> "be relevant to assessment of the equitable character of a delimitation first established on the basis of criteria borrowed from physical and political geography" (*ibid.*).

The Chamber therefore examined the effect of its proposed delimitation upon both fishing and petroleum activities. It considered that they could not be taken into account as relevant circumstances because they did not reveal that the result would be

> "*radically inequitable*, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned" (*ibid.*, p. 342, para. 237; emphasis added).

Malta ventures to make three observations regarding the approach adopted by the Chamber.

The first is that the Chamber accepted the basic relevance of economic considerations as material to the assessment of the equitableness of a line constructed by reference to physical and political geography. This is in accord with the position previously adopted by the Court.

The second is that the Chamber set very high the level at which economic considerations might be regarded as affecting the equitable validity of a line established by reference to geographic criteria. It appears to be not enough that the impact of the economic considerations should show the otherwise determined line to be merely "inequitable". The considerations must show that it was "radically inequitable". Again, it appears to be not enough that there should be merely "repercussions" from the proposed line upon the livelihood and economic well-being of the population of the countries concerned. It is necessary that those repercussions should be "catastrophic". Mr. President, Malta ventures to observe that these two qualifications of "radically" inequitable and of "catastrophic" repercussions do not appear to be ones which have previously figured in the Court's consideration of an equitable solution. The Court has not previously contrasted an "equitable solution" with a "radically" inequitable one. There is, therefore, room for consideration of the question whether there rests upon a party seeking to show that a solution is inequitable the seemingly heavier burden of establishing that it is radically inequitable.

A comparable comment may be made regarding the use of the word "catastrophic" as qualifying "repercussions". One may compare this word with the language used in paragraph 107 of the *Tunisia/Libya* Judgment, which dealt with the question of "economic considerations" and to which I have already referred. However, that paragraph does not seem to support the requirement that the economic considerations should spell catastrophe before they can have any impact upon the equitableness of the solution. Of course, both Malta and Libya will survive regardless of the indications which the Court gives in its judgment. Neither will be afflicted by catastrophe. If Malta's claims are recognized, the economic impact on Libya will be marginal. But if Libya's claims are recognized, the effect on Malta will be very serious indeed, in the sense that it will not be able to better its economic position by access to the natural resources which are believed to lie to the south-east.

Again, some clarification would be helpful as to whether it is necessary, in order to demonstrate the inequitableness of a particular line, that a party must demonstrate that the repercussions upon its livelihood and well-being will be "catastrophic".

And the third observation, Mr. President, that one may make upon the Judgment of the Chamber, is that it did in fact examine certain economic elements in the case — as is evident from paragraphs 238-241 of the Judgment. Thus the Chamber observed (para. 238) that:

> "nothing less than a decision which would have assigned the whole of the Georges Bank to one of the Parties might possibly have entailed serious economic repercussions for the other".

Again, in the next paragraph, the Chamber pointed out:

> "that the delimitation line drawn by the Chamber so divides the main areas in which the subsoil is being explored for its mineral resources as to leave on either side broad expanses in which prospecting has been undertaken in the past and may be resumed to the extent desired by the Parties" (para. 239).

So much then for the helpful Judgment of the Chamber in the *Gulf of Maine* case.

And I pause, next to submit, that there is useful guidance also to be obtained from the Report of the Conciliation Commission in the case of the *Continental Shelf Area between Iceland and Jan Mayen (International Law Reports*, Vol. 62, p. 108). The Conciliation Commission was of distinguished composition. The Conciliator appointed by Iceland was Mr. Andersen who had been the leader of Iceland's delegation to the United Nations Law of the Sea Conference; the Conciliator appointed by Norway was Mr. — now Judge-elect — Evensen. The Chairman was the eminent American lawyer and diplomat, Mr. Elliot Richardson.

The mandate for the Commission was:

> "the submission of recommendations with regard to the dividing line for the shelf area between Iceland and Jan Mayen. In preparing such recommendations the Commission shall take into account Iceland's strong economic interests in these sea areas, the existing geographical and geological factors and other special circumstances." (P. 111.)

In carrying out this mandate the Commission said:

> "Although not a court of law, the Commission has thoroughly examined State practice and court decisions in order to ascertain possible guidelines for the practicable and equitable solution of the questions concerned." (P. 125.)

The Commission expressly stated that amongst the factors to which it had given special consideration were the following:

> "*(a)* Iceland is totally dependent on imports of hydrocarbon products.

*(b)* The shelf surrounding Iceland is considered by scientists to have very low hydrocarbon potential." (P. 126.)

It is thus plain that both Iceland and Norway in drawing up the Agreement and the Commission in carrying it out had in mind that economic considerations had a direct and essential bearing upon the question. Nor was this regarded by the Commission as a consequence simply of its function as an organ of conciliation; the paragraph from which I have just extracted the mention of economic factors was itself introduced by the quotation of the paragraph from the decision of this Court in the *North Sea Continental Shelf* cases where the Court says that:

> "there is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures" (*I.C.J. Reports 1969*, p. 50, quoted at 62 *ILR*, p. 126).

In this respect, therefore, the Commission appears to have seen itself as applying the same legal standard as the Court would have. The Agreement of 22 October 1981, to which Libya has referred in its pleadings, states in its preamble that the Parties have found it possible to proceed on the basis of the Commission's recommendations, that is, the Agreement by which the two States, Norway and Iceland, agreed to implement the recommendations of the Commission.

A point has now been reached at which it may be appropriate for me to recall the direction in which my argument is developing. I have been examining the manner in which this Court, in the *North Sea Continental Shelf* and *Tunisia/Libya* cases, the Chamber of this Court in the *Gulf of Maine* case and the Court of Arbitration in the Anglo-French case have developed the concept of what I am calling "equitable principles/equitable result". The reason why I embarked upon this survey was to support two submissions.

The first, was to the effect that the circumstances or considerations material to the identification of an equitable solution were not limited to physical circumstances, but could and should embrace non-physical considerations in the shape of relative economic circumstances. On this first submission I believe that I have said enough — except perhaps to add this: that the economic circumstances which are referred to may be on a macro-economic scale, rather than on a micro-economic one. In responding to Malta's statement of the economic situation, Libya sought to make itself out as a country with an oil-dependent and therefore unbalanced economy — from this it would appear, in Libya's unstated submission, to follow that Libya requires more oil to maintain that condition for a longer period before it needs to readjust its economy to its changing resource circumstances, some time well in the twenty-first century. Malta does not believe that it is appropriate to enter into a discussion in this case of Libya's handling of its economy, whether in the future or in the present in relation to the future. For such a discussion, would, for purposes of contrast with the point I am making now, be in the field of micro-economics — the day-to-day details of how much money Libya makes and how much it spends and in what way.

Malta submits that it is sufficient now to refer to economics on a macro-economic scale, which is particularly possible in a case where there is so evident a disparity between the economic positions of the Parties. It may be recalled that in each of the cases in which equitable principles have previously been applied there was a much more even balance between the economics of the respective Parties.

Perhaps I may be permitted quickly to pass them in review. In the *North Sea Continental Shelf* cases, although the Federal Republic of Germany was evidently a more substantial economic unit than Denmark or the Netherlands, the imbalance was not on the scale that it is in the present case. In any event, the Court will remember that there was no argument between the Parties regarding the whole concept of equitable principles/equitable result and of the relevance thereto of economic factors.

In the Anglo-French case, the size of each of the contending Parties would have made a reference to economic balance absurd. In the *Tunisia/Libya* case, even though Libya may have been better off than Tunisia in oil terms and larger in terms of area, the discrepancy in their positions was perhaps not so large as to enable the Court confidently to embark upon a comparison of their respective economic strengths. And in the *Gulf of Maine* case, despite the fact that the United States is a more powerful economic unit than is Canada, each Party was of such a size that the outcome of the case could only have relatively little impact on the overall economics of the two States.

To say that that is not so in relation to Malta as one of the Parties to the present case is too obvious to require further rehearsal of the facts. Nonetheless, it is important that the Court should not permit the very obviousness and simplicity of this point to be obscured by a flood of more complex and controversial considerations.

Enough then, Mr. President, about the economic aspects of the concept of equitable principles/equitable results. With your permission, I should like to turn to the second aspect of the concept, which it falls to me to argue, namely, the relationship between equity and the idea of equidistance. This is, of course, a very important aspect of the case which will be dealt with primarily by my colleague, Professor Weil. However, it has been thought that it may be helpful to Professor Weil in keeping his argument within manageable dimensions if I address the Court on the question of State practice showing the use of equidistance.

Now it is not my purpose in referring to the extent and nature of State practice regarding the use of equidistance to repeat what Malta has already said on this subject in its three written pleadings. And what has also been expounded by the learned Agent for Malta. I shall seek to do only two things, and each of them, briefly:

The first is to recall the purpose for which Malta refers to State practice involving the use of equistance.

The second is to reply to some of the arguments raised by Libya in its Reply with a view to showing the unreliability of the Libyan presentation of material and hence the inadequacy of its response to Malta's assertion.

First, Mr. President, a few words about the framework or perspective within which Malta presents its evidence on State practice. Libya seems determined to read Malta's materials on State practice as being deployed exclusively to show that there is a rule of law requiring that the equidistance line be applied wholly and exclusively in situations such as the present. For this purpose Libya introduces the materials on State practice in its Reply *(supra)* (at para. 4.06) wih a quotation from a passage in Malta's Memorial which appears *not* in the section on State practice in Malta's Memorial, but in a chapter entitled "Malta's Entitlement as an Island State" (beginning at p. 43 of Malta's Memorial, I). It would have been much more to the point — and, of course, a good deal less creative of confusion — if Libya had identified Malta's ground for reference to State practice in the chapter where such grounds might reasonably have been expected to be found, namely Chapter VII on "The Principles and Rules of International Law applicable in the Context of the Present Delimitation" (this began at p. 59). Within that chapter there is a section entitled "3. State Practice" and within that section a subsection entitled "The relevance of State practice" (see p. 61). Within that subsection, following a quotation from the separate opinion of Judge Padilla Nervo in the *North Sea Continental Shelf* cases, there is a sentence which briefly and clearly identifies the role of reference to State practice. It says:

> "There is an evident value in recourse to the practice of States in like and comparable situations as an objective reflection of the application of equitable principles leading to an equitable result." (**I**, MM, para. 184.)

The point is made again in Malta's Counter-Memorial (**II**): "They [the delimitation agreements cited by Malta] provide compelling evidence of the standard of equity in customary law . . ."

And, of course, to refer to "customary law" in this situation is perfectly proper because the starting point of the whole consideration is that we are talking about equity within the law. It cannot for a moment be forgotten that the sole justification for recourse to equitable principles has been, since the first enunciation of the doctrine in the *North Sea Continental Shelf* cases, that law requires recourse to equity and that equity is applied at the dictate, and within the framework, of law. And Malta cites a body of practice which, though Libya may pick at it, has a relevancy, consistency and impact which defy contradiction. Finally, the point is repeated in paragraph 270 of Malta's Reply (*supra*):

> "State practice likewise provides clear indications that in comparable geographical situations the equidistance method was considered by the parties as producing an equitable result."

In short, Malta does not contend that there is an absolute requirement in the shape of a specific rule of law to the effect that the system of equidistance must be applied, regardless of the circumstances. It is Malta's contention that in the circumstances of this case, the equitable solution involves the application of the system of equidistance.

So I may now, Mr. President, turn to my second group of comments on the use of equidistance. In them I shall identify the unreliability in a number of material respects of Libya's presentation of material on this point — so many, indeed — that I am bound to invite the Court to reach the conclusion that Libya has entirely failed in its attempt to show that the use of equidistance has not been regarded by the Parties concerned as the equitable solution in those settlements in which it was used. It is, I venture to submit, important that the Court should not allow itself to be led by Libya's latest assertions to feel that there may be any such doubt about the material deployed by Malta as to warrant hesitation in accepting it as evidence of what States have regarded as being equitable in comparable situations. I would, in passing, respectfully recall to the Court's notice, the *Expert Opinion on State Practice* by Dr. J. R. V. Prescott, which is annexed to Malta's Reply. There in short compass, Dr. Prescott, an established authority on boundary delimitation, analyses the situation. Dr. Prescott has dealt with boundary delimitation, including maritime boundaries, in a number of works and for a period of years. He has produced books under such titles as *Boundaries and Frontiers* (1978), *The Political Geography of the Oceans* (1975), and the *Map of Mainland Asia by Treaty* (1975). He is a Reader in Geography in the University of Melbourne and a man who has specialized in this area more so than any other authority whom I can identify. His analysis does not need to be repeated here but is clear and speaks for itself.

To give substance to my invitation to the Court to reject Libya's attempt to rebut the relevance and content of the practice cited by Malta, perhaps I may be permitted to look more closely at the paragraphs on the subject which appear at pages 34 to 40 of the Libyan Reply *(supra)*.

In paragraph 4.06, after misstating the basis on which Malta refers to the examples of State practice — a matter to which I have already referred — Libya asserts that there are three principal defects in Malta's argument. I respectfully invite the Court to join me in a close scrutiny of some of the allegations of "defect", if for no better reason than to get some taste of the limitations of Libya's arguments on points of detail.

As part of the first alleged defect Libya declares:

> "It is clear that there is a large number of delimitation agreements where island States and island dependencies have not been accorded a median line in the delimitation of their continental shelves." (*supra*, LR, para. 4.07.)

When one looks at each of the Libyan examples, one finds that they never seem to tell the whole story. Either a part is omitted which is a part which supports equidistance, or the circumstances are identifiably different from those of Malta and Libya in the present case.

First, Libya produced three examples "found in the Maltese pleadings" (*supra*, LR, para. 4.08). The first example: the delimitation between Australia and Indonesia in which, so Libya states, Timor "received significantly less than equidistance treatment". That is true — but the situation was a special one. The line was dictated by the existence of the Timor Trough — a feature which creates a discontinuity between the Australian and Indonesian continental shelves of an entirely different and greater order of magnitude than any of the troughs which Libya invokes as relevant in the Pelagian Block. The deepest of the Pelagian troughs is the Malta Trough, said by Libya to have a maximum depth of 1,714 metres, a width of 11 miles and a length of between 87 and 108 miles (I, LM, para. 3.14). The same source indicates that the Timor Trough is more than 550 nautical miles long as opposed to 87 or 108 of the Malta Trough, and an average of 40 miles wide, as compared with 11 miles for the Malta Trough, and the sea-bed slopes down on opposite sides to a depth of over 10,000 feet, that is 3,000 metres or nearly twice the depth of the Malta Trough. Moreover, the Timor Trough marks the edge of a plate and is an area of subduction — thus amounting to a fundamental discontinuity in the strictest sense of the term.

The second and third examples given by Libya are of the treatment of the Italian islands of Pantelleria, Lampedusa, Linosa and Lampione and of the British Channel Islands. It is true that none of these islands was accorded an equidistance boundary — but the fact is that all the islands in question were dependent islands and thus not in a position comparable to Malta or to Bahrain, Indonesia, Japan, Sri Lanka, the Maldives, Cuba, Dominican Republic, Haiti and Papua New Guinea — to mention but some of the island States in relation to which equidistance has been applied.

The Libyan Reply then cites in tabular form 11 examples "where islands were not accorded strict equidistance in continental shelf delimitations" (*supra*, LR, para. 4.09). Mr. President, I began to prepare a comment on each of these situations and then, by the time I had reached the sixth illustration, realized that I was simply tilting at windmills. Libya is not using these examples to contradict the relevance of equidistance, but only to support the proposition that there are cases in State practice where strict (and I emphasize Libya's own limitation of its argument by the use of the word strict — that is their word) equidistance has not been followed in continental shelf delimitations involving islands. Of course, there are such cases. Malta does not say otherwise and does not need to say otherwise.

There are cases where small islands — and even not so small ones — were not given full weight in a delimitation. They are always dependent islands. None of them are independent States. None of them is comparable to Malta in size or location. So some deviation from the norm is not surprising. What matters for present purposes, however, is that in each case it is obvious that equidistance was the starting point and that equidistance was regarded as reflecting the equities of the situation.

I turn next to a second major defect which Libya claims to find in Malta's use of State practice, namely, the assumption (as Libya puts it) that a method of delimitation, because it has been used in particular delimitation situations between other States, must of necessity be employed as between Libya and Malta at least as an *a priori* or "primary" delimitation (*supra*, LR, para. 4.10).

It is important that Malta should make its position clear on this matter. Malta is not suggesting any automatic application of equidistance to the present case simply because it has been used by other States. Malta's proposition may be put in the form of a question: why is it that equidistance plays so large a part in the delimitation of continental shelves of island States unless there is some community sense that equidistance is equitable in such circumstances?

The Libyan Reply asks, "How does Malta know?" what are the factors which determine a State's choice of a particular line (see *supra*, LR, para. 4.11). The answer lies, in large part, in the language which States use coupled with the line which they actually draw. Thus, if States describe their agreement as equitable, or use some formula which has the same effect, and then use equidistance as the basic method of construction, can there be any better evidence that they thought that equity called for the application of equidistance?

One may look, for example, at the agreement between the German Democratic Republic and Poland concluded on 28 November 1975 (*Limits in the Seas*, No. 65). This is interesting for several reasons. First, the preamble states that the parties are "prompted by the desire to act in accordance with the provisions of the Convention on the Continental Shelf", and that of course was the Continental Shelf Convention of 1958. My understanding is that those provisions, Article 6, are seen, despite their wording, as being in effect, the equivalent of the equitable principles/equitable result concept. Second, the parties adopted the median line as the controlling principle. Now of course that was a delimitation between adjacent States but then comes the interesting part, the third observation. They expressly acknowledged that the line which they drew between them, the median line, should extend no further than a point equidistant between the German Democratic Republic, Poland and the Danish island of Bornholm. Fourth, it is clear that the relevant coasts of the German Democratic Republic and Poland are markedly larger than those of Bornholm. But, in so far as proportionality may depend upon the comparative length of coastlines, it is interesting that nothing is said about proportionality in this agreement between Germany and Poland and it does not appear that the concept was seen as having any role to play in the situation.

So, to sum up that item, Mr. President, what we have is a bilateral delimitation agreement. The governing principle is expressed in terms of reference to the Continental Shelf Convention of 1958 which for present purposes may be taken as an indication of the equitable solution approach. The other important element in it is that these two adjacent States, confronted by an island belonging to a third State, out at sea, took the view that their bilateral delimitation should stop at the equidistance point between those two States and the third State's island, which is an acknowledgment in effect that in terms of equity they saw equidistance as the proper rule to apply to the delimitation with Denmark.

Now, to take another example, almost at random, one may look at the declaration of Uruguay and Brazil of 10 May 1969 (which appears as an Annex in the United States series *Limits in the Seas*, No. 73). There we find an unusually explicit acknowledgment of the relevance and role of State practice. The substance of the declaration is that the two Governments recognize the median line as the lateral limit of their respective maritime jurisdictions. But the substance is preceded by a series of preambular paragraphs of which the last provides a highly pertinent indication of the factors which motivated the two countries to reach an agreement which each would evidently have been more than surprised to hear characterized as other than equitable. This is what the last preambular paragraph said of this declaration by Brazil and Uruguay:

> "Considering the precedents established by international doctrines and practices, multilateral conventions, and particularly Article 12 of the Geneva Convention on the Territorial Sea and Contiguous Zone for the purpose of determining the lateral border between maritime jurisdictions of neighbouring countries."

That is interesting. Here are two countries which reach an agreement. They do not expressly say that they are reaching that agreement on the basis of equitable principles leading to an equitable result. But as I have suggested, it is inconceivable that either State would have thought that the conclusion thus reached by agreement was inequitable. And for the purpose of reaching that conclusion, what do they say? They say: we have looked at "the precedents established by international doctrines and practices", multilateral conventions and particularly the 1958 Convention for the purpose of determining the lateral border. That seems to me to be an inescapable indication of the concern those two States had to reflect in their own practice the conduct of other States as being something which established equitable standards.

Mr. President, I shall not pursue further the disagreement between the Parties as to the extent and significance of State practice which applies the equidistance concept. It must, of course, be recognized that when the Libyan Reply was prepared, Dr. Prescott's expert opinion was not then available. This opinion makes it clear that equidistance is a concept which has dominated State practice in boundary delimitation. It is no use Libya saying that in a number of cases equidistance was applied in an imperfect or qualified manner. The fact is that equidistance was the basic concept, from which the process of delimitation must have started and as a result of which the line adopted was clearly recognizable as a modified equidistance line. Nor is anything gained by Libya if it questions the motivation underlying the use of equidistance. The point which is almost too obvious to require statement is that: Dr. Prescott states in paragraph 52 of his opinion the following:

> "Before 1970 the proportion of boundaries which relied on equidistance was 76 per cent. In the period since 1969, 83 per cent of boundaries defined by the agreement have relied on equidistance." (*supra*, MR, p. 168.)

The dates of 1969 and 1970 are obviously selected by reference to the date of the Court's Judgment in the *North Sea Continental Shelf* cases. Can it for a moment be seriously maintained that States in concluding these agreements thought that the results which they were achieving were anything other than equitable?

I turn at this point from the question of the application of equitable principles, in the form of the concept of equidistance. But in doing so, I am anxious to avoid leaving the Court with any impression that equitable considerations which I have not mentioned, but which have previously been developed in Malta's written pleadings, are being abandoned. That is not the case at all. But I am mindful of the Court's rule relating to the appropriate content of observations in the course of the oral hearing. My task in relation to equitable principles and the associated identification of relevant circumstances has been a limited one — limited to some elaboration of the nature of State practice and a recollection of the relevance and role of economic factors. But as the oral arguments for Malta proceed, it will become evident that such additional considerations as Malta's concern for her own security are still a very important part of Malta's case.

I hope that it will not be seen as unduly repetitive if I emphasize the implications of Libya's claim that the boundary should be drawn within and along the line of the Rift Zone. The Libyan claim, if accepted, opens up the possibility that a continental shelf boundary line might be established within 25 nautical miles of Malta's shores. Libya would have sovereign rights to operate in this area with a view to exploring for and exploiting the natural resources of the sea-bed and subsoil. Malta would be confronted by the prospect of constant ship and aircraft movements close to its shores but not subject to its regulation, supervision or control. This movement would extend in time beyond the period of exploration to that of the construction and use of oil drilling and production rigs, standing on the sea bottom, with a wide range of associated submarine devices emplaced on the sea floor. It would be natural for anyone to feel apprehensive about all this activity and the presence and even possible misuse of so much technologically advanced and sophisticated equipment.

I hardly need to tell this Court of matters of which it can so readily take judicial notice. For we are no longer talking about development in the sea by reference to small rigs: we are talking about developments in the sea which involve the use of massive towers that stand several hundred feet high and provide accommodation for a hundred or more men, that include helicopter landing pads, and are in effect virtually artificial islands.

If the Libyan contention were accepted, and let us say the 1973 proportionality line were adopted, the effect would be that within perhaps 25 miles of Malta's coast, within ten minutes' flying time for a helicopter, you would have these structures. There would be the risk of pollution in the event of blowouts or other accidents, and yet none of the activities on board these artificial islands would be under Malta's jurisdiction.

Such a situation would be unacceptable anywhere else, except in areas so geographically constricted that geography created homogeneity and led to co-operation between neighbouring States. But there is no such geographical constriction here. In terms of simple national security, the proximity of so much foreign physical presence within, as I suggested, so short a flight of Malta, not more perhaps than 15 minutes' flight from its principal centres of population such as Valletta, is bound to be creative of genuine unease in Malta. The exposure to such threats and apprehensions is something which is a matter of good sense and fairness, as well as of sovereign equality, and should be shared by the Parties equally; and the achievement of such equality is itself an equitable consideration favouring the use of the equidistance method.

Mr. President, I now turn to the third main section of my submissions. This relates to the "technical" part of the case — the geology and geomorphology of the area between Libya and Malta; and I recognize that 20 minutes before lunchtime is hardly the best moment in the day at which to turn to a subject which so manifestly provokes so little reaction amongst all of us.

But, the crux of this case for Libya is its assertion that there is in the so-called Rift Zone "a fundamental discontinuity in the sea-bed and subsoil separating the shelf area between the Parties". If Libya is wrong in this assertion, that is effectively the end of Libya's positive case. It may be left with the possibility of criticizing the development by Malta of its case. But unless Libya can satisfy the Court, in a clear and convincing manner, of its contention that the Rift Zone separates the shelf areas of the Parties, it does not even have the starting-point to support the most important of the submissions with which it concludes its Reply. This is Submission No. 9:

> "The principles and rules of international law can in practice be applied by the Parties so as to achieve an equitable result, taking account of the physical factors and all the other relevant circumstances of this case, by agreement on a delimitation within, and following the general direction of, the Rift Zone as defined in the Libyan Memorial."

If one knocks out the validity of that reference to a line "within, and following the general direction of, the Rift Zone", there is nothing left by way of positive assertion in the Libyan case; and that is why one has to look at the technical matters.

I can sincerely assure the Court that the last thing that I ever wanted was to get involved in a discussion of the geology and the geomorphology of the Mediterranean sea-bed. I should much prefer to argue solid points of law. Indeed, as the Court will have observed from the evolution of Malta's pleadings in this case, it is only reluctantly and subsidiarily that Malta has been prepared to follow Libya into any discussion of the sea-bed characteristics of the area. As the Court will appreciate, Malta's principal position in relation to the Libyan Rift Zone assertion is that as a matter of law it is irrelevant having regard to the substitution of distance for natural prolongation in its physical sense as the basis for claims to the continental shelf. Thus, even if Libya's presentation of its geological case were well founded in fact, it could not in law have any impact upon the present case. And this point will be duly developed by my learned friend, Professor Weil.

Nonetheless, since Libya has accorded such prominence to its geological case, the Court may feel that if Malta declines to react to it, that could reflect either some inability on Malta's part to do so, or some belief on the part of Malta that Libya's geological case is relevant and unanswerable. Nothing could be further from the truth; and so it falls to me to develop Malta's submission that Libya's case on the character and effect of the Rift Zone is, quite simply, wrong. And after that I shall need to refer to the Libyan argument regarding the so-called "Escarpments-Fault Zone".

I begin with the Rift Zone, and, Mr. President, if you will permit me, just so that we can all be clear as to the area about which I am speaking may I be permitted just to indicate it on the map. I am going to draw a line in the area in which I understand, in the Libyan arguments, is covered by the Rift Zone; and it is something that goes like this.

It lies to the west, the south-west, the south, and even so it is claimed, to the south-east of Malta; and it lies, as the Court can see, very close to Malta — as I said a moment ago, the northern parts of the so-called Rift Zone can be as close as 25 nautical miles to the coast of Malta. And it is, as the Court will equally observe, a considerable distance away from the coast of Libya.

There are three respects in which the picture of geology and geomorphology presented by Libya cannot be accepted.

First, it is incomplete. It fails to analyse specifically and precisely the concept of a fundamental discontinuity separating the shelf areas between the Parties.

Second, the presentation of some important facts, and of the consequences sought to be drawn from others, are open to sufficient adverse comment to deprive them of persuasive value.

Third, the Libyan technical argument is incomplete because it fails to give due weight to other features of the sea-bed in the area between Malta and Libya which, if geological and geomorphological considerations are pertinent, have as much bearing on the question of delimitation as have the features constituting the so-called Rift Zone.

I shall begin with the fundamental defect of the Libyan case on the Rift Zone. Now this is not so frighteningly technical as one might apprehend. This defect is Libya's failure to establish the existence of the claimed fundamental discontinuity which, so Libya asserts, places Malta and Libya on two separate natural prolongations and hence on two distinct continental shelves.

It is a striking feature of all three stages of Libya's written pleadings that they contain no attempt whatsoever to identify the meaning of the expression "fundamental discontinuity" on which the whole of their case hangs, no attempt whatsoever to identify the meaning of that expression or the establishment and elaboration of it in factual terms. The point is simple, they do not, at any point in their pleadings, really grapple with the problem of the meaning of fundamental discontinuity. I will explain that now.

For example, the first place in the pleading at which a reference is made to "continuity" — namely, at the beginning of the section on "The General Setting" in Chapter 3 under the title "The Geomorphological and Geological Setting" (**I**, LM, para. 3.06) — the words "the continuity of this area of shelf" are used as if they had a single, clear, inescapable meaning. Apparently, it was not thought necessary to suggest that there was any room for a distinction to be drawn between the sea-bed and its subsoil or within the subsoil between the upper and the lower crust, which lie above the earth's mantle.

Indeed, the Libyan Memorial goes on with a persistence which excludes accident, actually to confuse the gemorphological and the geological aspects of the matter. Thus, it states a clear distinction between the Pelagian Block and the African Plate. "These are", Libya says, "quite different kinds of physical entities and are not co-extensive" (**I**, LM, para. 3.11). "The first", Libya states, "is geomorphological; the second is geological and involves consideration of the entire lithosphere of the earth" *(ibid.)*. At this point, therefore, the emphasis in the Libyan Memorial is on a geomorphological separation between Libya and Malta. In the next paragraph (para. 3.12) the Memorial glides into a different proposition without acknowledging the change of direction. In entering into a description of the northern boundary of the Pelagian Block (which, as recently as the previous paragraph, was seen as a geomorphological or, in effect, a surface feature), the Libyan Memorial claims that the features of this boundary "separate in the physical sense the natural prolongation of the Libyan landmass northward from the natural prolongation of Malta southward". Now, to most readers, Mr. President, this would appear to be a reference to geological considerations since such words as "natural prolongation" and "landmass" refer to inherent content and structure rather than to surface shape. And fair enough, the Libyan Memorial within a few lines slips in a reference to the need for a discussion of geology. And so it continues: in one paragraph there is a reference to geomorphology (e.g., para. 3.15); in the next a reference to geology (para. 3.16); in the one following (para. 3.17) a reference again to geomorphology and in the one following a reference to them both in the phrase "the Rift Zone is a geological feature whose significance is reflected geomorphologically and whose effects are deforming the sea-bed and subsoil" (para. 3.18).

But that is a statment which begs the material questions. For the questions are: how much sub-soil? To what depth? And, most important, with what effect relevant to the task of the Court — a task of determining the limits of the entitlement of the Parties to the legal concept of the continental shelf?

As I have stated, the Libyan Memorial never grapples directly and openly with these questions. The nearest that it comes to them is the statement made almost glancingly that "Geologically, these Troughs are deeply-seated grabens which extend into the base of the earth's crust" (**I**, LM, para. 8.03). But in contrast with many less material assertions in the Libyan Memorial, this vitally important one is not accompanied by any evidential demonstration.

This failure to define the relationship between the claimed discontinuity between the natural prolongations of Malta and Libya and the subject-matter of the case is maintained in the Libyan Counter-Memorial. Malta is charged with conducting a "sketchy" discussion (**II**, LCM, para. 2.55) and with being "casual" in its treatment of sea-bed features (**II**, LCM, para. 2.64). But Libya's argument, for all the dimension of its technical display, still limits its mention of the essential detail to the statement (para. 2.59) that the depth of rifting in the area of the Medina Channel, which is only one of the rifts upon which it comes to rely:

> "slices through the Tertiary, Cretaceous, Jurassic, Triassic and Permian layers of the subsoil (strata as old as 250 million years) down to a depth of more than 5 kilometres. Seismic reflection profiles confirm this fact."

However, it is nowhere demonstrated that this faulting, whatever its degree and depth, establishes a "fundamental discontinuity" in relation to the very continental shelf in the delimitation of which the Court must aid.

That is not to say that the Libyan Counter-Memorial entirely ignores the relation between sea-bed and continental shelf. At one point, after making the important declaration that Libya does not question that "this whole area is part of the same African plate which is generally acknowledged to include the southern part of Sicily", the Libyan Counter-Memorial continued thus:

> "But the African Plate is not synonymous with the continental shelf. In fact, there are several distinct continental shelves to be found on the African Plate." (**II**, LCM, para. 2.60.)

Yet this assertion, of critical importance to Libya's case, is supported by a reference to authority which, when scrutinized, turns out to involve a number of manipulative steps which remove the conclusions a long way from the original data.

When one turns to the Libyan Reply, the situation is not much different. Again, the text speaks of the Rift Zone consituting "a fundamental discontinuity in the area of continental shelf lying between Libya and Malta . . ." (*supra*, LR, para. 5.21). But beyond developing certain technical arguments already canvassed in the pleadings and to which I shall presently return, the concept of discontinuity in the continental shelf as such is not further developed.

And so, Mr. President, after what may seem a long introduction, I state expressly the point which during these past few minutes I have been making by implication. The Court is concerned with the delimitation of the continental shelf. Though the continental shelf is an expression which is geological in its origin, it is for the purpose of this case something which is legal in its present content. To speak, as do the Libyan pleadings, of a "fundamental discontinuity" in the sea-bed and the subsoil or in the continental shelf is absolutely not to the point unless that discontinuity is related to a currently acceptable working concept of the continental shelf. Not only does Libya not attempt to establish that relationship; it appears to be entirely unconcerned with the need for it. That is the first defect in the Libyan argument.

Now, it is reasonable to ask oneself, why should Libya have failed to grapple with this point? It could certainly not be because it failed to perceive its pertinence. It is rather, I would submit, because once the relevance of the point is identified, it is in the present case quite impossible to establish an appropriate discontinuity in the relevant continental shelf.

*The Court rose at 1 p.m.*

## ELEVENTH PUBLIC SITTING (28 XI 84, 10 a.m.)

*Present:* [See sitting of 26 XI 84, Judge Lachs absent.]

The PRESIDENT: Further to my announcement yesterday, Judge Lachs is unable to be with us this morning.

## ARGUMENT OF MR. LAUTERPACHT *(cont.)*

COUNSEL FOR THE GOVERNMENT OF MALTA

Mr. LAUTERPACHT: Perhaps the Members of the Court will permit me to remind them of the point that I had reached in my argument yesterday, by approaching it from a slightly different angle. It occurs to me that I could conveniently begin this morning by indicating to the Court the limited and unintimidating range of the physical features which figure in the controversy in this case.

For this purpose may I ask the Court to use, as the basis of this survey, ㉔ Figure 3 in the looseleaf binder provided by Malta. This is the one which is entitled "Faults and Rifting in the Pelagian Basin".

㉔ This Figure corresponds to Figure 19, which appears in the Annexes to the Maltese Counter-Memorial (**II**), Volume II, at page 50. So, I should be grateful if the Court would now allow me to take it through the following steps. I may ㉔ say that I have adopted this Figure 3 as the basis for presenting the situation to the Court, because the lines on it, which represent the pattern of troughs and rifting in the Pelagian Basin will assist the Court in finding the various fea- ⑪ tures which I shall indicate in a moment on the map. The Court will also find it helpful, perhaps not now but in due course, to look at the bathymetric chart of the Pelagian Sea, which appears in Malta's Counter-Memorial (**II**), Volume II, at page 16; it is helpful and easy to follow.

I turn to the map behind me in order to go through the various features of the area.

Here is the Pelagian Sea; the whole of this area here, stretching up into its eastern limit, which corresponds in name with the edge of the escarpment. At that point the Sea changes its name and becomes the Ionian Sea; and the Court is primarily concerned with this section of the Pelagian Sea and part of the Ionian Sea.

The water depths in the Ionian Sea are evidently much greater than they are in the Pelagian Sea. This is a bathymetric map, and so of course the colours reflect the water depths.

The point should however be made that notwithstanding the considerable depths of water in the Ionian Sea, that whole area falls within the definition of the continental shelf which appears in the 1982 Law of the Sea Convention, the words of which I shall refer to in a minute. And the reason why, notwithstanding the depths, this is continental shelf area is because the sea-bed is overlain by a depth of six to seven kilometres of sediments. This area is also all continental shelf as is evident from the depths concerned.

Here is Malta and the associated island of Gozo. May I invite the Members of the Court to do as I do now, which is to connect the north-west extremity of the island of Gozo with the sea terminus of the land boundary between Tunisia and Libya by a straight line — rather like this. I am sorry that I am not very good at drawing straight lines, but that is intended to be a straight line connecting the two points. I shall call this line "the Straight Line" for ease and convenience. I apologize to my colleagues for venturing to use the definite article and capital letters to describe a feature even more common than the Rift Zone.

The area to the north-west of this line obviously does not lie in any way between Libya and Malta — the area to the north-west of that line.

In order to give the Court a full description of the area, so that it is as fair as much to my colleagues as it is to us, I have to go to the north-west of the line to identify the island of Pantelleria.

Stretching south-east from Pantelleria, between the two lines which appear ㉔ on Figure 3 just to the south-east of Pantelleria, is the Pantelleria Trough. That is in approximately that area, there — the two lines are the ones which have teeth, facing inwards and are running south-eastwards from Pantelleria.

Then at the south-east end of the upper line running from Pantelleria, with its teeth facing to the south-west, at the south-east end of that upper line one runs into the Malta Trough, which is approximately that area — there — and lies also between two lines with their teeth facing inwards.

The deep part of the Malta Trough lies principally to the north-west of the Straight Line. Only a small section of deep water lies to the south-east of the Straight Line, just south of Malta. Then the Malta Trough becomes markedly shallower, as the waters become shallower, and it runs into the Malta Channel, which is the extension to the east.

Now we have to go back to the south-east end of the Pantelleria Channel once more. We have looked at the extension of the northern part, now we must look at the extension of the southern part and when I use the word "extension" I am not accepting that that is a description of what actually happens in geological terms but it is convenient to use that word to describe the area to you. It is clear that at the south-east end of the Pantelleria Trough we run into the Linosa Trough, which stretches for a short way — I have made a slight mistake because the Linosa Trough does not extend beyond the Straight Line. The Linosa Trough is to the north-west of the Straight Line. So, to recapitulate, the Pantelleria Trough and the Linosa Trough lie entirely to the north-west of the Straight Line. Only the Malta Trough stretches slightly to the south-east of the Straight Line.

I go to the next feature. We have here a large innominate area — it does not have a name — which is at the end of the Linosa Trough, south of Malta where the waters are shallower. These waters then run towards the Medina Channel here and this Medina Channel descends into the Heron Valley, which is there. So we have the Malta Channel to the north, the Medina Channel to the south and the Heron Valley lying at that point.

South of the Medina Channel is the Medina Bank. This is a much shallower area and it is important in this case because it is the area in which we are all interested because in this whole region in dispute this is the area believed to be one where oil is most likely to be found. It lies well to the north of the equidistance line. It is the area in which Malta granted concessions in the period 1973-1974. So, this is the Medina Bank.

Just to the south-west of the Medina Bank lies the Melita Bank and to the south-west of the Melita Bank lies the Jarrafa Trough, which corresponds with

㉔ the row of parallel lines in Figure 3, which is the second one from the bottom.
Perhaps it will be helpful if I indicated first the Tripolitanian Furrow. The
Tripolitanian Furrow lies here, in this area, and is the bottom set of parallel
㉔ lines with the teeth facing inwards in Figure 3. Slightly above that and slightly
to the north-west of that is the Jarrafa Trough — the set of parallel lines above
the Tripolitanian Furrow. The Jarrafa Trough gets deeper as it runs in the south-easterly direction. Likewise the Tripolitanian Furrow gets deeper as it runs in the south-eastern direction. The Tripolitanian Furrow is, of course, the Trough on which the Court has something to say in the *Tunisia/Libya* case. The Court in that case rejected the Tripolitanian Furrow as a relevant feature because the Court considered that its significant depths lay too far to the east to affect the delimitation between Libya and Tunisia. But those features of the Tripolitanian Furrow — its depths —, which were not relevant in the *Tunisia/Libya* case are relevant in this case — that is to say if any such features are relevant at all — because in this case the deeper waters of the Tripolitanian Furrow in this area lie, of course, between Libya and Malta.

Mr. President, I have ventured to take the Court through this accumulation of features, not because Malta attaches importance to them, but because Libya does so, or at any rate, attaches importance to all of them except those that do not suit it, namely, the Jarrafa Trough and the Tripolitanian Furrow.

So, at this point, we can come back almost to the point that we had reached yesterday and identify the crux of Libya's case. Starting from the Pantelleria, Malta and Linosa Troughs — which all lie to the north-west of the Straight Line and with the exception of that small projection of the Malta Trough slightly to the south-east of that line, Libya constructs out of those Troughs and of their much milder sea-bed expressions to the south-east, namely, the Malta and the Medina Channels, this conception of the Rift Zone, but really it rests simply on those three Troughs which stretch so far, and in one case only a little further, and then the relatively shallow expressions of the faulting to the south-east of Malta.

This area is not described by Libya as a rift zone but as "the Rift Zone", as if it were something very special and controlling. At the same time, while asserting the relevance of these features to the north, Libya insists on the irrelevance of the comparable features of the Jarrafa Trough and the Tripolitanian Trough to the south. This is a major discrepancy in Libya's approach to the geology and geomorphology of the area and I shall have more to say a bit later. For the moment, I limit myself to the situation in the north.

Here Libya says that there is a "fundamental discontinuity", such as by itself to warrant the area to the north of the so-called fundamental discontinuity being regarded as one continental shelf and the area to the south of it as another; Malta's to the north; Libya's to the south.

And that is how I come to the point at which I closed yesterday. Although Libya talks about a "fundamental discontinuity", it never identifies in legal terms the structure in which that continuity is said to lie and to operate. Nor does it ever say what is meant to a geologist or geomorphologist by the concept of a fundamental discontinuity. Malta's position on the point is as follows: the only structure in which a discontinuity, if one exists, can operate in legal terms, is the legal structure of the continental shelf and the discontinuity must be of a kind which is recognized in law.

I can now pick up at the point where I stopped yesterday. This is an appropriate place at which to refer to the definition of the continental shelf which appears in Article 76 of the 1982 Law of the Sea Convention, and I apologize for reading parts of it because I am sure it is so familiar to you:

> "1. The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance. [That is the basic concept.]
>
> 2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6."

Paragraph 3 is important:

> "3. The continental margin comprises the submerged prolongation of the landmass of the coastal State, and consists of the sea-bed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof."

And then there is in paragraph 4 a definition:

> "4. *(a)* For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:
>
> (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope".

Mr. President, I do not really need to read anything more except the statement:

> "*(b)* In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base . . ."

My learned friend Professor Weil will deal with the legal implications of that definition in due course.

It is evident from this definition that the existence of a geological fault system or of the geomorphological reflection thereof in a continental shelf will not affect the existence in law of the continental shelf. The natural prolongation of the land territory of a State is deemed to extend to the point at which the slope and the rise descend to the deep ocean floor. But that deep ocean floor is not reached by the troughs and grabens of which Libya speaks in the Rift Zone. Even in the area of the Ionian Sea and the abyssal plain to the east of the Sicily-Malta and Medina Escarpments the thick sedimentary cover which overlies the deep abyssal plain brings it fully within the definition of the continental shelf. Italy and Greece have shown by the southern projection of their agreed continental shelf delimitation that they regard their common continental shelf as extending into depths far greater than those of the troughs mentioned by Libya. The Court will remember that the Italian-Greek line is coming down into this area and ends somewhere in that zone. But as the Court can see the line comes into this area of very deep water and the sea-bed on either side of the line lying beneath that deep water is deemed by both Italy and Greece to form part of their respective continental shelf areas. And even Libya itself claims an entitlement to continental shelf rights in this same area east of the escarpments. The whole of this area stretching from here right over to here falls within the range of Libya's continental shelf claims. There is this massive area to the east of Ras Zarruq and stretching as far as the Egyptian border. This is all this same deep water which overlies a depth of six to seven kilometres of sedimentary deposits and thus constitutes the area of continental shelf within the definition of the Law of the Sea Convention. So mere falling away of the sea-bed, even to great depths, does not terminate the continental shelf. That is the important point that I seek to make.

This should not be regarded as surprising. It is entirely in accord with the development of modern drilling technology which is now capable of drilling commercial wells to depths of seven and eight kilometres and of doing so in depths of water even as great as two kilometres. (See Michael E. Jones, *Deepwater Oil Production and Manned Underwater Structures* (1981), pp. 9-10). In other words, there is no technical reason why the economic activity principally associated with the continental shelf should not be carried on in great depths of water and in great depths of underlying sedimentary deposit.

The fact that there may be faulting in the subsoil through which the drill passes in no way deprives the area in which the drilling occurs of its continuity as continental shelf or indeed even of its geological continuity. Of this I shall have more to say presently.

But then, the question may understandably be posed: if, as I submit, the presence of even a deep fault does not amount to a fundamental discontinuity in the continental shelf, what does?

There are two elements in the answer.

The first is that the concept of "fundamental discontinuity" is in fact one with which geologists as such are not familiar. In their art they do not have to talk about "fundamental discontinuity". Of course, they may use the word "discontinuity" alone, because that is a purely descriptive word. But scientists need much more than the adjective "fundamental" to identify in satisfactory scientific terms the size or character of a discontinuity. Essentially, the phrase "fundamental discontinuity" is a layman's term. It has no technical geological meaning or relevance.

That being so, we come to the next element in the answer to this question of what could a "fundamental discontinuity" mean. If one is to speak of any discontinuity in a sense which can be recognized by geologists, then the only real discontinuity in the earth's lithosphere — that is to say, the whole of the area between, so to speak, the bottom of the sea and the top of the highly molten area beneath the earth's crust — is where continental crust meets oceanic crust and this happens, for example, at the foot of the continental slope between the Ionian abyssal plain and the African continental shelf. Other discontinuities of comparable magnitude may be found in what are called mid-ocean spreading centres — in the deep ocean — where plates are diverging. Or yet again, one finds such discontinuities in highly active continental margins where plates are converging and creating areas of subduction, as in the Timor Trough. But the so-called "Rift Zone" does not fall into any of these categories. In other words, to have a discontinuity of a kind that is significant you have to have this line between oceanic crust and continental crust.

Mr. President, I now turn to the second main heading of my consideration of the geomorphological and geological technicalities of the Libyan case in relation to the Rift Zone. This is that Libya's interpretation of the basic data is so open to question that the Court should not accept it.

I shall submit that the Libyan suggestion that there is a fundamental discontinuity in the area of the so-called Rift Zone is not established in any sense material to this case. This is in part because the rifting, such as it is, is in the wrong place — not between Libya and Malta. And I make the point again, that this is where the deepest rifts are, to the north-west of the Straight Line. It is also because the expression of that rifting to the south-east is not such as to make it a dominant sea-bed feature. Moreover, some of the important evidence adduced by Libya is unclear, both in its content and in its significance. And one also has to recall lastly that the features upon which Libya so strongly relies are virtually no more significant than the features upon which it does not rely in the south-east, namely the Jarrafa and the Tripolitanian Furrows which it seeks to reject. In other words if geology and geomorphology are going to play any role in this case, the role must be an evenhanded one. The Court cannot look just at the geology or geomorphology in the north-western part of the region and ignore the significant rifting and furrowing in the south-eastern part of the region.

Now before developing these points I should like to say at the outset that there is one aspect of the Libyan argument which I reserve for my third main heading, namely, its incompleteness which is largely the point I just made to you — its failure to pay due regard to the features of the sea-bed to the south-east. I shall come back to that in due course. Now I shall concentrate on the limitations of the Libyan case relating to the so-called Rift Zone.

I have already made the fundamental point that Libya has failed to define what it means by a "discontinuity" in any manner that is pertinent to this case. To argue about whether something is or is not a fundamental discontinuity when you are not told what "discontinuity" means is rather pointless. What is clear is that in the absence of definition, discontinuity can mean different things to different people. In the absence of definition, all that one can talk about are features which may or may not have some significance, depending entirely on the subjective outlook of the observer.

It is perhaps as well that I should relate this reference to subjectivity to the language which is used in one of the more substantial items of evidence accompanying the Libyan case. There is an article by Dr. Finetti — one of the experts who produced a Technical Annex for the Libyan Memorial — called "Geophysical Study of the Sicily Channel Rift Zone". This appeared earlier this year in an Italian geophysical publication. This article repeatedly uses language of a subjective character. Three of Professor Finetti's favourite words are "huge", "prominent" and "remarkable". But Mr. President, words like this have no meaning unless one identifies the point of comparison: by reference to what other features are the ones which he identifies as "huge", "prominent" or "remarkable" — in what way are they huge and in what manner and in what degree?

Let us analyse but one example. In the first sentence of the article he speaks of the "huge" troughs of Pantelleria, Linos and Malta. These are the three troughs up in the north-west, north-west of the Straight Line. He does not apply this same adjective to the easterly expression of those troughs, the Medina and Malta Channels. In other words the other parts, the features which lie to the south-east in the area between Malta and Libya are not described as "huge". What makes some "huge" and others not? Presumably the Court will be told that it is a matter of difference between respective lengths, breadths and depths. But if it is the hugeness of some which warrants their identification, why should others, not so classed as "huge", be deemed to possess a comparable relevant significance — and I slip away again to another point — especially when there are yet other features, the Jarrafa and the Tripolitanian Furrows further to the south, in every way comparable in size with the non-huge features upon which Libya relies, and over which Libya would like to pass in silence.

I shall have more to say about them later. In the meantime, I am anxious to suggest — with the greatest of respect — that considerable caution must be exercised when reading the descriptive language used by Libya or its experts in order to avoid being swept away by what I may call the "enthusiasm" of the words used.

In the remarks that follow, I shall concentrate on statements made in the Libyan Reply, and will take a number of them in turn, in the order in which they are made.

1. At paragraph 5.19 the Reply *(supra)* states that "the principal point about the Rift Zone that has emerged from the pleadings of the Parties to date is that its physical existence is acknowledged by both Parties". That is not a correct statement. As the Libyan Reply itself acknowledges, Malta does not concede that there is an area called "the Rift Zone". Libya has adopted this name for the area which specially interests it. Just as I have adopted the name "the Straight Line" for the line that interests me. But the name "Rift Zone" is not a name which geologists or geomorphologists have attached to this area to distinguish it from other areas. The expression does not have the same connotation as, for example, the words "the Gulf", namely, the area of sea which lies between, principally, Iran and Saudi Arabia. When one speaks of "the Gulf" the words would nowadays be taken as referring only to that area and to no other. But if, in the course of a discussion among geologists, one were to refer to "the Rift Zone", without more, the participants would all look uncertain and would ask: "which Rift Zone? There are so many."

The nomenclature "the Rift Zone" is thus a confection manufactured by Libya for its own purposes in this case.

What Malta acknowledges is that there is an area of rifting between Malta and Libya, but it is not so special as to warrant the attribution to it of an aura of uniqueness by according to it the use of the definite article and the use of the capital letters; nor is it so special or so specific as to warrant identifying it as a relevant discontinuity in the continental margin which falls to be delimited between the two countries; nor is it limited to those features which Libya invokes as "constituting a fundamental discontinuity".

2. In paragraph 5.21 of the Reply *(supra)*, Libya once again refers to seismic profiles in an attempt to support its assertion of the existence of a fundamental discontinuity "between Libya and Malta". This attracts two comments:

(1) First, there is no basis for assuming that because a fault appears on a seismic profile, it necessarily reflects a relevant "fundamental discontinuity". For example, what the profile along line MS 19, as it is called, shows is, of course, that there is faulting in the technical geological sense, that is to say, in the sense that the layers of subsoil have, so to speak, slipped one against another. But the basic continuity of the sea-bed as a physical feature is unaltered. The same geological layers appear in the same vertical sequence; they appear in approximately the same thickness; and they appear with the same sedimentary and fossiliferous content all the way from Libya to Malta.

For all scientific authorities who have worked in this region are agreed that the entire crust beneath the Pelagian Sea and the sediment layers deposited upon it form a geological unity, a definite geological unity. The ages and types of rocks found in Malta and the distinctive fossils contained in them are the same as those which are found in eastern Tunisia and northern Libya. In geological terms the entire crust beneath the Pelagian Sea has formed a platform with essentially the same sediments deposited across its entire area at any given geological time. For example, Dr. Finetti, an expert for Libya, has written in an earlier article than the one which I have already cited, namely, his article with Professor Morelli in 1973 (Finetti and Morelli, 1973, *Bolletino di Geofisica*, Vol. 15), that "in the Strait of Sicily there is absolute continuity of the continental African plate from Tunisia/Libya up to the Ragusan massif [that is, the rocks of south-eastern Sicily]" (p. 261). He also said that:

> "there exists an absolute continuity of sediments from southern Sicily to the northern African coasts, and all the sequences involve variable, but always consistent thicknesses of pre-pliocenic Tertiary and Mesozoic [i.e., sediments deposited more than 5 million years ago]" (p. 299).

It is true that, although the entire Pelagian Block forms a geological unity, it has through its history been frequently stretched and faulted. When continental crust is stretched, it breaks along faults because it is brittle. Most areas of continental crust in the world, and particularly those lying near the edges of large plates like the African Plate have numerous faults in them and the Pelagian Block is no exception. When continental crust is stretched it often accommodates the stretching by faulting along two inward-dipping faults, with the crustal block in the middle dropping down to form a valley or graben.

If the stretching motion ceases, a valley will be left. If it is beneath the sea this valley will gradually be filled with sediment deposited in the sea until eventually the sediment completely fills the valley leaving a flat overlying sea-floor. Then one can only determine how much stretching has occurred by mapping the down-faulted layers of rock using seismic reflection profiles (which give a cross-section along the profile).

Libya has drawn attention to a number of disconnected grabens south and south-west of Malta which they refer to as the "Rift Zone". These are relatively young in geological terms, having been formed only over the past 10 to 15 million years. Although according to Dr. Finetti's 1984 paper, the motion has decreased in recent times, the area appears still to remain active and there has not been time for the graben troughs or valleys to be filled with sediments. Therefore they appear as valleys or troughs in the sea-bed. However, the average rate of subsidence, even in these troughs, is less than one millimetre per year.

Now, I must ask to be forgiven if the point which I am about to make is seen as being very elementary — but it is a point which must be borne in mind when there is talk of rifting and faulting. The activity of striking, slipping, stretching, wrenching and rotating is reflected in actual openings and gaps only in the surface of the sea-bed when, in the manner I have already described, a rift, trough or channel may open up and then in due course be coated or filled with sediments. But, Mr. President, it is important to appreciate that underneath the sea-bed, in the subsoil, there are no gaps. Even when there is a fault, the two surfaces or planes on either side of the fault are in constant contact with each other under the pressure of the superjacent water and of the sea-bed itself. So, from the layman's point of view, there is no subsoil physical discontinuity. You could not squeeze a razor blade into the crack.

While I realize that any analogy is bound to be faulty in some respect, perhaps one might liken the sea-bed area between Libya and Malta to a wedge-shaped slice of layer cake with its apex or point lying to the west-north-west of Malta and the rest of it spreading, almost like a fan, towards the east, with one side running past Malta and the other down towards Libya. In a way not dis-
㉔ similar to the layout of the troughs which appear on Figure 3. I have in mind

a slice of cake which looks something like that, as a slice of layer cake. It is as if someone had taken a very sharp knife with an extremely fine blade and made some random cuts in the cake and then with his fingers had pressed the top of the cake down unevenly — just as my little son might if he were grabbing for it greedily. As a result, the alignment of the layers is disturbed, but the cake still remains in existence. The cake can still be eaten and, to the extent that it must be equitably divided between some who are affluent and others who are not, the cuts have no *a priori* role in the process. Within the cake there would be no fundamental discontinuity.

Mr. President, a fundamental discontinuity would appear only if the cake were placed alongside a chocolate eclair. Though there would be a continuous line of pastry, one would in fact be speaking of two entirely different kinds of structure — in the same way as one speaks of the difference between the continental crust and the oceanic crust, while the only problem in the present case is although we may have a piece of layer cake we do not also have a chocolate eclair.

(2) The second comment to be made on the reference to seismic profiles in paragraph 5.21 of the Libyan Reply *(supra)* combines with the comment to be made on paragraphs 5.22 and 5.26. All three paragraphs are concerned to develop Libya's contention that there is an elongation of faulting amounting to a fundamental discontinuity which exists not merely in the area to the west of Malta but extends in a south-easterly direction towards the Escarpment. What Libya is really saying is that there is faulting here and that this faulting extends in such a way as to constitute a fundamental discontinuity onwards as far as the Escarpment.

As to this Malta has already pointed out that the deepest area of faulting as expressed in the geomorphology of the sea-bed, lies to the north-west of the Straight Line, that is to say not at all between Libya and Malta. As a result the zone constituted by the Malta, Pantelleria and Linosa Troughs does not on any basis lie between Libya and Malta and cannot have any direct bearing on the delimitation of the area which does lie between Libya and Malta. This can be seen with the greatest clarity on the bathymetric chart of the Pelagian Sea to which I have already referred. True, there is some faulting between Malta and Libya in the area of the Malta and Medina Channels, that is to say, in this area down here — there is no point in denying that there is faulting — there is faulting, but the faulting is much shallower and reflects the fan-like effect of the rotational movement which commences to the north-west and of which the south-eastern channels are the gentler expression.

I wanted to buy a fan in The Hague to show the Court how this fan-like effect works, but unfortunately I could not find one, so I had to make one. That is meant to be a fan and as the Court will observe — and know from its own experience — when you have a fan and you seek to open it, naturally the troughs, if I may so call them, are deeper at the handle end of the fan and get shallower towards the far end of the fan. So this is the situation really, that we have a fan-like situation in the area with the deeper troughs — the Pantelleria, Malta and Linosa Troughs — being up here to the north-west and then the extension of shallower troughs being towards the south-east, *not* limited to the northern part up here but also existent in the southern part. And what has happened has been — though in a way which is too technical to describe in detail — there has been this kind of opening up and rotational movement of the earth's crust which has led to this faulting. But not anything so significant as to create a fundamental discontinuity. Now it is evident that the Parties are not in agreement on the way to describe the degree of south-easterly projection of the Malta, Pantelleria and Linosa Troughs. Libya invokes the technical paper of Malta's expert, Professor Vanney, in claiming support of the contention that the Malta Trough lies between Malta and Libya.

Two things must be observed. The first is that Libya, having begun by asserting the significance of all three troughs, ends by relying upon one trough only, the Malta Trough, which stretches just to the south of Malta. The second is that the south-eastwards extension of the Malta Trough is only slight in relation to the area of dispute between the two Parties and therefore can hardly serve as an essential factor in establishing the existence of any relevant fundamental discontinuity.

When Libya attempts, in paragraph 5.26 of the Reply *(supra)* to overcome the relative slightness of the intrusion of the Malta Trough into the area lying between the two Parties, it does so by citing a paper written by experts who have assisted the Libyan team (see *supra*, LR, p. 65). Even these experts start from the premise that the area in question forms part of the African margin stretching northwards; and the language used to describe the relevant geological events is hardly that of "fundamental discontinuity", but merely that descriptive of three styles of faulting.

So that, Mr. President, concludes my second comment on the seismic faulting.

3. I should refer next to a further argument which Libya develops in paragraph 5.27 of the Reply *(supra)* as bearing out its contention regarding the discontinuity between Libya and Malta, and as they allege "the continuity of the Rift Zone". In other words, while there is discontinuity here, the allegation is that there is continuity there. The argument which they use in paragraph 5.27 is a quite striking illustration of the type of argument which Libya has been forced to develop.

The argument consists of reliance upon gravity anomaly data along the Rift Zone. Now, what is meant by "gravity anomaly data"? These words refer to the measurement of the force of gravity to determine the thickness and character of the crusts in any particular area. The thinner the crust, the greater the measurement of gravity. Because in a thinner area the measurement is greater than one would expect in a normal or unfaulted area, one speaks of a "gravity anomaly" and hence of "gravity anomaly data". From a study of these gravity anomaly data, Libya seeks to identify a line which it calls an axial ridge of the
㉗ Rift Zone. This is illustrated on Map 10 (opposite *supra* LR, p. 66). I am very sorry, we have not put that into the Maltese dossier and it is being prepared so that you may see it, and it will be handed in in due course.

This map, which appears at the moment in the Libyan Reply, is an apparently clear and simple red line which is said to represent "the axial ridge of the Rift Zone where the crust has been stretched to its thinnest point". I hope I will not be accused of deliberately distorting the line but I am going to attempt to draw it into this map so that the Court may see for what Libya is contending. Effectively, Libya is suggesting that there should be a line that goes something like that — it may not be entirely accurate — but something like that.

Mr. President, I am sorry I missed something and my learned Agent has very helpfully recalled this to my notice. May I invite the Court to turn to
㊹ Figure 13 in Malta's loose-leaf book and there you will see the axial ridge line. It is a red line drawn in, starting just to the north-west of Pantelleria and apparently passing through Pantelleria, through the Pantelleria Trough then down towards Linosa and then moving through the south-east, and I see happily

coinciding on this map with quite considerable parts of Libya's 1973 proportionality line, and then moving up to the north-east, through the Malta Channel until it reaches the escarpment. I am sorry, it is a very small line to be seen on this map.

Paragraph 5.27 of the Libyan Reply *(supra)* refers to Annex 7 as containing the technical foundation for this line. The first limitation on this approach which has to be appreciated — but is clearly not brought out in the Libyan pleading — is that the residual gravity map, from which that red line is derived, is not a direct or immediate reflection of objectively verifiable elements. Measurements take place, but after the stage of measurement the resulting data have, as I understand it, gone through two stages of modification, each involving the exercise of the author's discretion. Now, what are these two discretionary stages? The first was to use a mathematical procedure to correct the effect which the body of water lying above the sea-bed has upon the measurements of the gravity field. In other words, to get some uniform approach to the measurements, a guess has to be made of the density of the rock below the water, and this has to be followed by a calculation of the quantity of rock of that density which would fill the relevant water column. In that way, one can "even out" all the underlying material, but that all involves a guess. That guess may be an informed guess but the elements in it are not identified, indeed the fact that a guess has been made has not been mentioned.

Then there comes the second discretionary stage. The information, after this first guess has been put into operation, is then "filtered". In Annex 7 of the Libyan Reply, there appears what is called the residual gravity map. I have a copy of this here and it is of that that a copy will be presented by Malta in due course. At the bottom left-hand corner of the residual gravity map there is a reference to "filter length" which appears to be the square root of 10s = 31.6 kilometres, and no explanation was provided, either in Dr. Finetti's article or in the Libyan Reply, of why that length was chosen; and there is no obvious reason for it. What is meant by this concept of a "filter" is that certain points are left out in order to obtain a certain evenness of line. That filter is expressed in terms of distance, 31.6 kilometres, but why this was chosen is not stated. It thus leads one to think that perhaps that is the length which best suits the theory which the production of the map is intended to support. The Court will appreciate what the theory is. That if you can identify this axial ridge line it reflects some kind of break in the crust, so that there is a fundamental discontinuity evidenced by the gravity anomaly.

Apart from the uncertainty relating to that evidence, there is the fact that when one looks at that residual gravity map and at the axial ridge line drawn on the basis of it, one can observe the arbitrary manner and preconceived ㊹ character of the line which appears so smoothly drawn in Figure 13 of Malta's loose-leaf book. On the map on page 18 of Annex 7 of the Libyan Reply one can see the so-called axial ridge line, drawn as a pair of black parallel tramlines. What is this line? It is, in fact, nothing more than a line which has been drawn to connect certain highs on the map. The map is expressed as an ordinary contour map, but it is not a map of the contours of the sea-bed, it is a map of gravity anomalies. And so there are certain highs where there is more gravity and therefore, presumably, thinner crust. So, what the axial ridge line is doing is connecting the highs and the line which Libya has drawn is manifest from the map. But one has to look more closely at the map, and when one does this it is evident that there are many highs besides those which Libya has used as the points which are connected by its axial ridge line. These other highs, or plus signs, are marked by two characteristics:

(1) They are no less numerous than those through which the Libyan axial ridge line was drawn.

(2) Those other highs or plusses reflect gravity anomalies of comparable magnitude to those through which the Libyan line is drawn. That is to say, they are marked by contour lines carrying the number 5 and 10. It is both possible and permissible, and indeed, in this case, necessary to connect these other highs by lines in the same way as Libya has connected the highs which it has chosen to underlie its own axial ridge line. But if these other highs are comparably connected, one gets a very different picture. I apologize for the lack of a figure in our dossier, but we shall have one prepared and circulated as Figure 40.

For example, in the western sector of the map, a line could have been drawn running in a generally north-south direction through an eastwards-bending curve. In the southern central part of the map an almost north-south line could have been drawn. Lastly, and perhaps most compellingly of all, in the south-east corner, only a little more than 100 kilometres north of the coast between Tripoli and Misurata, a line could have been drawn roughly parallel to the axial ridge line selected by Libya, but at least 200 kilometres nearer to the Libyan coast. This would have reflected the existence on a comparable scale of gravity anomalies in the Tripolitanian Trough — a subject to which I shall return later.

Now if that is the kind of evidence that is introduced to buttress the Libyan case, I suggest that the validity of that case is, to say the least, seriously compromised. Libya may contend in its reply that the residual gravity map is only a subsidiary argument. That would not meet Malta's criticism. In the first place, Dr. Finetti in his 1984 article (p. 7) expressly claims that the residual gravity anomalies additionally "provide a very important contribution to the understanding of the deep effect of the observed fragmentation". Secondly, even if the gravity anomaly data constituted a subsidiary argument, one could quite properly pose the following dilemma: either the main argument is sufficiently strong to support Libya's case, in which event there is no need to bolster it, or it is not sufficiently strong — and so Libya, apparently, thinks; otherwise it would not have brought in the residual gravity map. And if the main argument is not strong, a persuasive argument cannot be made out of an accumulation of individually weak arguments.

*The Court adjourned from 11.15 a.m. to 11.30 a.m.*

Having thus identified the weakness of the use of the gravity anomaly data, I should return for a moment to the character of the rifting upon which Libya relies. In paragraph 5.25 of the Reply *(supra)*, in an attempt to meet Malta's observation that the so-called Rift Zone, if it is a discontinuity at all, does not extend to the south and south-east of Malta in any significant way, Libya states "a feature of this size involving pull-apart and shearing motions, is necessarily diffuse". Now, in this manner, Libya effectively concedes Malta's point. Whatever may be the magnitude and nature of the rifting to the west and north-west of Malta, the rifting to the south and south-east of the so-called Rift Zone of Malta is much less intense because of the fan-like character of the feature. The nature of this development is shown in Part II of Annex 2 of Malta's Counter-Memorial **(II)**, the part prepared by Professor Mascle. There he

shows, at pages 47 to 51, the configuration of a zone rifting by an anticlock-
㉔ wise rotation of its northern part and Figures 18-2 and 19 demonstrate pre-
cisely what is going on in the relevant area; and Figure 19 is the one which
㉔ is reproduced in Malta's loose-leaf book as Figure 3. As is particularly clear
from this Figure, once one moves south-eastwards from the zone of deeper
rifting west of Malta, which does not lie between Malta and Libya, there is no
particular reason why one should adopt as the south-west extension of that
rifting only the Malta and Medina Channels. The fan-like spread of rifting also
stretches down to include the Jarrafa Trough and, to the south and south-west
of that, to include even the Tripolitanian Valley. Professor Mascle concludes
with these words:

> "the Pelagian Sea is the seat of extensional faulting which is relatively concentrated in the western region and is on the contrary diffused in the east. In the latter case, locating a structural limit becomes problematic." (**II**, MCM, Vol. II, p. 56.)

Mr. President, if I may just go back to my fan for a moment, the fan illustrates very clearly what Professor Mascle is saying, that the Pelagian Sea is the seat of extensional faulting which is relatively concentrated in the western region — in other words, the faulting is deeper and more concentrated at the handle end of the fan: and is, on the contrary, diffused in the east. So there you are, at the east, and it is spread out and diffused. Now, it does not stop there, but it extends there to include the Jarrafa and the Tripolitanian Furrows.

The Libyan Reply does not contradict this conclusion but pretends rather that it is irrelevant, as may be seen from paragraph 5.28 of the Libyan Reply *(supra)*. Now it is difficult to see what is relevant about an explanation of the structure of the relevant area of sea-bed and subsoil which contradicts the Libyan contention that the Malta and Medina Channels are the exclusive continuation of the so-called fundamental discontinuities, if they are the continuation of it at all.

One of the difficulties that Libya has in discussing its so-called Rift Zone is that this zone is in fact a composite feature of many separate troughs. Its greatest expression, the Pantelleria Trough, is far to the north-west of Malta, well outside the area of delimitation at present under discussion. The Pantelleria Trough in the west is replaced in the east by the two troughs with greatly reduced sea-bed expression, the Malta and Linosa Troughs. Even further eastwards, immediately south of Malta, the troughs are represented by the Malta and the Medina Channels, which exhibit even less sea-bed expression.

The generation of the fault grabens, or troughs, as a result of the large-scale rotation, which has been discussed by Malta, not only satisfies all the scientific data but also explains why there are more troughs in the east of the Pelagian Block than in the west: the reason is that the extension that results from the rotation is greater in the east than in the west, and so it causes more of these grabens, or troughs, to be generated in the east. Furthermore, the Jarrafa and Tripolitanian Troughs in the south of the area are seen to be the result of the same rotational extension as has caused the opening of the so-called Rift Zone in the north.

Measurements have been made of the extension recorded by the grabens
㊱ along a profile running northwards from Tripoli in Libya to Ispica (Fig. 4).
The extension has been calculated since the end of the Mesozoic period, that is
to say during the last 65 million years, because the rock layer deposited at the
㊱ end of the Mesozoic is easily identified on seismic profiles (shaded on Fig. 4).
Having measured the angle at which the faults dip downwards from the many

seismic profiles, and the amount by which the rocks are displaced by the faults, it is possible to determine what amount of extension has occurred. The results show that the extension of the northern troughs — those of Malta and Linosa — is the same as the extension of the southern troughs — that is to say, Jarrafa and Tripolitania — along that line (Tripoli-Ispica). Thus, the Libyan Rift Zone is not unique. The amount of extension in the southern half, nearest to Libya, is the same as the amount of extension over the last 65 million years in the northern part of the Pelagian Block, the half nearest to Malta. Again, the shallow water area of the Lampedusa Plateau and the Melita and Medina Banks appears as an axis of symmetry dividing equally the extension to the north and the south. In other words, here is the Lampedusa Bank, here are the Malta and Medina Banks, so in a sense you have this row of Banks lying between the faults to the north and the faults to the south, the so-called axis of symmetry.

Libya asserts the belief "confirmed by scientific papers and even by Malta's own experts, that the essential elements of fact which establish the Rift Zone are clear and uncontroversial" (*supra*, LR, para. 5.28). Malta does not share this belief, nor is it confirmed by Malta's own experts. There may be a fair measure of agreement about the elements of the situation, but the interpretations and conclusions of the experts differ considerably.

It is not correct to say, as the Libyan Reply (*supra*) claims in the next paragraph (para. 5.29), that the evidence put forward by the pleadings of both Parties establishes the existence and importance of the Rift Zone. Nor is it true that "this evidence shows that it cannot be regarded as other than a fundamental discontinuity in the sea-bed and subsoil in areas of shelf lying between Libya and Malta". The evidence certainly does not show that the Rift Zone is a "fundamental discontinuity", either as a matter of geological and geomorphological fact or in any legally relevant sense.

Mr. President, I turn now to the third main criticism of Libya's case on the so-called "Rift Zone" — namely its failure to give due weight to other features of the sea-bed in the area between Malta and Libya. I have already hinted at this several times. The point is not always easy to disentangle from the response which Malta has had to make to other Libyan arguments regarding the existence of the Rift Zone in the north. But as the Court will have appreciated, Malta's main contention regarding the southern aspect is that the Libyan arguments have failed to take account of geological and geomorphological features which lie further to the south between Libya and Malta. If any geological or geomorphological features have any bearing on the present case, these southern features certainly have as much relevance as the northern features which constitute, in Libya's contention, the so-called Rift Zone.

Libya has virtually ignored the extensive faulting that is found throughout the entire Pelagian Block south of the so-called "Rift Zone". The continental crust between Libya and Malta is cut by numerous other faults, particularly so south of the 35th parallel. Many of these faults have a similar west-northwest-east-southeast trend to the faults of the "Rift Zone". This faulting has been reviewed by Dr. Mascle in the Technical Annex of Malta's Counter-Memorial. Nonetheless, it is worth emphasizing the complete agreement of all authorities, even Libya's own scientific advisers, on the presence of extensive faulting in the southern Pelagian Sea. Good maps of the faulting in the southern Pelagian Block appear in Figures 15 and 16 in the paper by Professors Jongsma, van Hinte and Woodside, of which a copy was furnished by Libya to the Registry and the figures are included as Figures 38 and 39 in Malta's dossier. Some of the faulting in the south and particularly that near the Libyan coast, has been present for very long periods, up to 200 million years, in contrast to the more recent faulting in the north of the Pelagian Block and some of these faults in the south have formed grabens or troughs, namely the Jarrafa Trough and the Tripolitania Valley.

I ought perhaps at this point just to observe that the fact that the faulting in the south is older than the faulting in the north does not diminish the validity of the final concept. Things do not all take place at the same time in geological terms. So this happened first — down at the bottom — and as a result of it happening first, as I will explain again in a moment, and by virtue of it being closer to the Libyan shore than is the faulting to the north, the sediments from the continent had been washed down into the sea and therefore there has been more sediment and more time for these troughs in the south to be filled out and thus for the sea-bed to become more level.

Several cross-sections from Libya to Sicily, again exhibiting considerable deeply penetrating faulting, appear as Figure 7 in the paper by Professor Jongsma and his colleagues. The extensive faulting throughout the Pelagian Block has been discussed by Dr. Finetti in his 1982 paper. He writes that: "During the last main extensional phase of the Miocene-Quaternary [i.e., in the last 25 million years] a remarkable stretching and faulting activity affected the whole Pelagian Sea . . ." (p. 255); and that:

> "The Sirte Rise [in the south Pelagian Sea], as well as other geological provinces of the studied area [which was the Pelagian and Ionian Seas] was greatly stretched during the third extensional phase of the Middle Upper Cretaceous." (P. 247.)

Dr. Finetti recognizes several extensional phases which have affected the southern Pelagian Sea. In the Gabes-Tripoli-Misurata Basin, for example, he writes that the basin is the result of the "extensional geodynamic movements which occurred in the Triassic [i.e., about 200-250 million years ago] and before in Palaeozoic [i.e., older than 250 million years]" (p. 253). Following this episode of stretching, several further similar extensional phases occurred, as he describes at page 254:

> "After the Paleozoic-Triassic stretching movements other important extensional geodynamic phases occurred in the Middle Jurassic [*c.* 180 million years] and especially in the Middle-Upper Cretaceous [*c.* 65-100 million years]. With this last one are associated remarkable igneous effusions of a basaltic type. Basaltic layers in the Middle-Upper Cretaceous have been found in several points by drilling exploration. These movements were accompanied by a consistent subsidence of the basin. Extensional and subsidence activities occurred also successively. In the Middle-Upper Miocene to Quaternary [i.e., the last 15 million years], one of the main extensional phases which affected not only and not particularly this area took place."

The Libyan Reply, mindful of the implications of this extensive faulting in the southern Pelagian Sea, did not seek to refute its presence; instead Libya suggested that it should be ignored and attention focused solely on the faulting in the "Rift Zone" for the purposes of delimitation. The main Libyan arguments for this stance are that the faulting in the south Pelagian Sea is outside the area of dispute, and that it is "ancient" with little sea-bed expression, and both these parties can easily be refuted as I will now attempt to do.

First, Libya suggests that the faulting of the southern Pelagian Sea is outside the area of dispute in which they seek a dividing line and so should be ignored (*supra*, LR, para. 5.33). It is no exaggeration to describe as extraordinary the argument that the faulting of the "Rift Zone" to the south of Malta is a proper topic of discussion just because Libya claims the sea-bed so far north as that, but the faulting in the southern Pelagian Sea, a similar distance from the Libyan coast, should be ignored simply because Malta does not push its claim an equivalent distance southwards. Why does Libya talk at all about the northern faults? They constitute, says Libya, a fundamental discontinuity, but in or of what are they a discontinuity, one must ask? The answer is, presumably, in a claimed natural prolongation of Libya. Well, one is bound to reply, if the natural prolongation of Libya is relevant, is it not equally relevant that there lies between Libya and the claimed area of natural prolongation a feature of a magnitude comparable to the one which is said to terminate the natural prolongation?

The Court may find it helpful at this point to be referred to the passages in its Judgment in the *Tunisia/Libya* case where it dealt with the Tripolitanian Furrow. In paragraph 66 of that Judgment the Court said

> "The only feature of any substantial relevance is the Tripolitanian Furrow; but that submarine valley does not display any really marked relief until it has run considerably further to the east than the area relevant to the delimitation."

Now, of course, the area relevant to the delimitation in the *Tunisia/Libya* case was this area here — and so it is quite understandable that the Court saw no relevance in the structure of the Tripolitanian Furrow which lies here. But even so, the Court then did observe the depths of the Tripolitanian Furrow and use the expression that it did not show any really marked relief until it had run into this eastern and now relevant section.

In that paragraph, therefore, the Court made it clear that the most eastern relevant point on the Libyan coast for the purpose of the Libyan case was Ras Tajoura and said that it could not take into consideration such parts of the sea-bed of the Pelagian Block as lie beyond those limits.

Now, the part of the Tripolitanian Furrow which is relevant to the present case is precisely that part which lies east of Ras Tajoura and which displays this "really marked relief" of which the Court spoke in paragraph 66 of the 1982 Judgment. This can be seen very clearly from the bathymetric chart which I have already mentioned. (LR, Fig. 1, opposite p. 65.)

Mr. President, in fact the most stable, least faulted region of the Pelagian Block is the crust of the Melita-Medina platform which has remained relatively shallow and stable for hundreds of millions of years. The Melita-Medina platform lies midway between Malta and Libya and separates the region of faulting in the "Rift Zone" to the north from the extensive region of faulting of the Gabes-Tripolitania-Misurata Basin to the south. The delimitation line identified by Malta as equitable in fact lies over this stable crustal block.

I turn to the second main Libyan argument for discounting the importance of the faulting in the southern Pelagian Sea. This is the suggestion that it is "ancient" and that the sediments which have been deposited in the region cause the faulting to exhibit reduced sea-floor expression. It is true that much of the extensive faulting in the southern Pelagian Sea was active before the present "Rift Zone" was formed, as I explained a moment ago. As we have already noted, the extensional phases that have affected the whole Pelagian Sea have occurred in episodes.

But that does not mean that because the southern faulting is "old", the northern faulting is "new" and, therefore, in some way better or more relevant.

The extensional phases in the Pelagian Sea have, as elsewhere, taken place in episodes which occur simultaneously in different locations and to different degrees. The fact that there may be active faulting in the north does not exclude the possibility that there may be less active faulting going on in the south; and vice versa. The important point is that if one adds up the faulting in the southern part of the Pelagian Sea, it is as great as the faulting in the northern part, but simply spread over more faults. In other words, you may have a fault which is deep like this — one fault — but elsewhere you may have two faults which are approximately half the size of the first fault, but those two faults half the size of the first add up to the same kind of situation as constituted by the first. Moreover, it is to be noted that the faulting in the "Rift Zone" which started 10 to 15 million years ago has already passed its zenith. In other words, we do not have an area which is going on being active. It does not show acceleration or positive movement to go on, it is something which apparently is already declining. Dr. Finetti notes in his 1984 paper which is reproduced in part in Annex 7 of the Libyan Reply *(supra)*:

> "The first rift movements commenced in the Early Pliocene [5 my ago] (or Late Miocene) [10 my ago] and continued . . . until the Late Quaternary: then they decreased but remain still active at the present time."

So we are on a downward trend. Over the same period, there is certainly faulting in the southern Pelagian Sea, as reported by Blanpied and Bellaiche in the article which has been incorporated as Document A at the back of the Maltese loose-leaf folder (in *Marine Geology*, 1983, Vol. 52, pp. 1 ff.). The faulting in the southern Pelagian Sea may not be so intense as that in the north, but it is there, in the Jarrafa Trough which exhibited "a perennial and active tectonism throughout post Miocene times [i.e. the last 5 my]". The published profiles across the Jarrafa Trough show that the faults there are still actively moving. The same is to be observed on the western part of the Tripolitanian Furrow. The fact that faults in the earth are still active in the Tripolitanian Trough near the Libyan coast is also demonstrated by the fact that an earthquake (of a magnitude of 4.5) has been recorded there. The present-day topographic expression of the troughs in the southern Pelagian Block (Tripolitania and Jarrafa) is not so great as that of the troughs in the so-called "Rift Zone", but this is only because, as I said earlier, these troughs are nearer the mainland, and so closer to the supply of sediment which has filled them in. The sediment has partially filled the valleys, reducing their sea-floor expression. When the original shape of the valley floor, which shows how much faulting has occurred, is examined by seismic profiles it is found that the size of the Tripolitania and Jarrafa Troughs is similar to that of, for example, the Linosa and Malta Troughs, as shown by Figure 7 in the paper by Professor Jongsma and his colleagues.

So far Malta has shown that the faulting of the so-called "Rift Zone" is certainly not unique in the Pelagian Sea, but that there is equally deep-seated faulting across the entire region of continental crust between Sicily and Libya. It is possible to go even further than this. As was shown in the Maltese Memorial, all the troughs in the Pelagian Sea, including those in the south, are the geometric result of the process of extension that has applied to the entire region (including the Tunisian Sahel, the Pelagian Sea, western Libya and south-eastern Sicily). This process of extension has occurred intermittently throughout the last 180 million years, and often the same troughs have been repetitively opened (Finetti, 1982). It can be described by a simple counter-clockwise rotation of 10 to 15 degrees during the last 10 million years of the

Iblean Plateau (i.e., the area south-east of Sicily) with respect to the African landmass (south of the Tripolitanian Valley). This rotation is disparaged by Libya as a "rather imaginative discussion" and as a "mere theory", but it is based not just on the pattern of faulting but also on palaeomagnetic measurements published in high-level scientific journals (e.g., Besse *et al.*, 1983, 1984). Libya has ignored these palaeomagnetic data, with which their model does not fit. Since the palaeomagnetic data are relevant and well-established scientific facts the Libyan model of the "Rift Zone" which ignores them must be called into question.

Finally, Mr. President, it is perhaps necessary to refer to the Libyan suggestion that "a 'microplate' may be in formation along the Rift Zone". It should be observed that the authorities cited in support of this suggestion are articles published in the year 1984 by experts who have themselves been directly associated with the Libyan case.

It should be emphasized that even these experts only say that a microplate may be in formation. They do not assert it positively. It is strange that no hint of such a suggestion affects the scientific material presented by Libya in connection with the *Tunisia/Libya* case. Indeed in that case, Libya demonstrated that the Pelagian Block was a unit extending north of Malta. This appears clearly from two figures which the Court may like to examine in the Libyan Counter-Memorial in the *Tunisia/Libya* case. The first is Figure 1 in the Libyan Counter-Memorial, 1981. This shows the Pelagian basin extending north of Malta, in a manner not consistent with the newly deployed Libyan arguments. The second is Figure 6 in the same Counter-Memorial of 1981 which shows the whole of the Pelagian Sea as an aseismic, that is to say, an inactive block, with no hint of the microplate that Libya now contends may be seen in it.

The text of the Libyan Counter-Memorial in the present case also has some bearing on the subject. Having stated that the Rift Zone "clearly ranks among the major and relatively rare rift zones of the world", a footnote to page 52 of the Counter-Memorial (**II**) states:

> "In somewhat more technical terms, the Rift Zone is an incipient boundary where continental crust has thinned owing to the pull-apart effect of the deep-seated *grabens* noted above. However, the extension of the earth's crust has not evolved to the point at which ocean crust has been created . . ."

The Court will recall my earlier distinction between continental and ocean crust as being the only kind of discontinuity that would really have any meaning. Here they say:

> "However, the extension of the earth's crust has not evolved to the point at which ocean crust has been created. It may be described as the beginning of a continental breakup. At the stage at which the Rift Zone now is, it is characterized by diffuse features."

This is evidently not language descriptive of a microplate. The incipient boundary is many millions of years away and cannot possibly have any relevance to the present case as evidencing the existence now of a fundamental discontinuity. Indeed, it may never come into existence at all since, as I have suggested, there is evidence that the faulting is now decreasing.

So much then for the geology and geomorphology of the sea-bed under the Pelagian Sea. With your leave, Mr. President, I should like to pass on to make a few remarks about the area to the east of the Pelagian Block, the area which Libya has called "the Escarpments-Fault Zone" — this is the escarpment-fault zone and this of course is the Ionian Sea which lies beyond it. I should correct one remark that I made earlier in the morning. You will recall that I drew the line of the Italian/Greek continental shelf boundary and I terminated it there. I made a mistake. I should have terminated it a good deal further to the south — at this point here — which is the southern point of the deepest part of the Ionian Sea.

The Libyan Reply calls for a few comments. First, in paragraph 5.40 of the Reply *(supra)*, Libya seeks to press the degree of agreement between the experts on the two sides too far by stating that:

> "the Parties are in agreement over the fact that the Escarpments-Fault Zone forming the eastern boundary of the Pelagian Block constitutes a fundamental break in the morphology of the sea-bed and subsoil".

Once again, the problem may appear to be semantic, but its resolution in the bland manner which Libya asserts may create an impression which Malta would not entirely share. The question is, what does Libya intend to convey by the phrase "a fundamental break in the morphology of the sea-bed and subsoil"? In footnote 3 to page 72 of the Libyan Reply *(supra)*, Libya declares that it "has never conceded that Malta's continental shelf rights extend this far to the east". That means as far to the east as here. It has never conceded that. At the same time, Libya, in the same footnote, acknowledges that it is not its position that the continental margin as defined in Article 76 (3) of the 1982 Law of the Sea Convention ends at the Escarpments-Fault Zone. So what is it that it has been saying? That it does not concede that Malta's shelf can extend beyond the line of the escarpments. On the other hand says Libya, it does claim that this area is continental shelf within the meaning of the 1982 definition. Is then the allegation that the Parties are in agreement that the Escarpments-Fault Zone constitutes a fundamental break in the morphology of the sea-bed and subsoil an attempt to imply that in some way Malta agrees that the eastern limit of its continental shelf must be sought at the edge of this zone? If it is, Malta must emphatically repudiate it.

Next, in the same paragraph (5.40) Libya goes on to make the same point in somewhat different language:

> "The point is simply that the Escarpments-Fault Zone represents a fundamental change in the morphology of the sea-bed and subsoil, forming the edge of the continental shelf underlying the Pelagian Sea, often referred to as the 'Pelagian Block'."

Malta does not accept that the change in morphology "forms the edge of the continental shelf underlying the Pelagian Sea". Why? Because the implication of the language used by Libya is that in some way the continental shelf, whether of Malta or of Libya, under the Pelagian Sea is bounded by the limits of the Pelagian Block. I must emphasize that there really is a danger of getting caught up in words here because the concepts are very simple. This area is called, for convenience, the Pelagian Sea, and this area for convenience is called the Ionian Sea, but although the morphology is different, although the shape of the sea-bed is different between this area and this area, the law is that the whole of this area is one continental shelf in the eyes of the law and so this representation, that in some way the escarpment here affects the continental shelf continuity, is wrong. This escarpment or fault where the sea-bed falls down into the depths no more denies Libya the opportunity of coming across up the escarpment in this southern area here, than it denies Malta the right to extend its continental shelf area over the edge of the escarpment. For the purposes of continental shelf delimitation, this is a single area and this feature, although it is prominent, makes no difference.

We have here a situation in which despite the dropping away of the sea-bed to the east of the escarpment, the sediments forming the sea-bed are of such a thickness that they fully satisfy the requirements of the definition of the 1982 Law of the Sea Convention.

The emphasis in the Libyan Reply on the absence of discontinuity between Libya and the Ionian sea-bed to the north of Libya is accompanied by the assertion that the escarpment "cuts across and disrupts . . . the Maltese prolongation to the east" (*supra*, LR, para. 5.40). This may be so in geomorphological terms; it is not so in legally relevant continental shelf terms. Once the essential continental shelf continuity and unity of the whole area is recognized, then there is no reason for according Libya a special advantage simply because there is no drop between one level and another of its continental shelf in this eastern sector.

As is properly pointed out, I mis-expressed myself — there is in truth a drop. The fact is that just as there is a drop from this lighter blue into this darker blue, so here there is a drop from the lighter blue into the darker blue. It is only close in to shore that Libya has the kind of continuity with its continental shelf that it is insisting that Malta must have with Malta's continental shelf.

Mr. President, that brings me to the end of the main points of my argument. No peroration is required. But a summary of my main conclusions may be of some help in drawing together what I have said, and that summary consists of ten points:

1. The task of the Court under the Special Agreement is to identify the relevant principles and rules of international law with the same degree of particularity as these principles were identified in the *Tunisia/Libya* Judgment. This means in effect that the Court should indicate the boundary which in its view would result from the application of the method which it chooses. The Court should not reach a conclusion in terms so general as those proposed by Libya.

2. The Court is not entitled under the Special Agreement from which it derives its jurisdiction in this case to take into consideration the claim identified by Italy except by the terms of what I may call the "without prejudice" statement foreseen by the Court at pages 26 to 27 of its Judgment of 21 March 1984.

3. The task of the Court in terms of the application of law is to apply equitable principles in order to achieve an equitable result.

4. The circumstances relevant to the identification of the equitable result are not limited to ones of a geographical nature. The Court is entitled to weigh all circumstances including, especially, ones of a macro-economic character. The established possession, or lack, of resources by the Parties, relative to each other, is certainly a relevant circumstance.

5. The application of equitable principles in the present case leads to the use of the concept of equidistance. In identifying these equitable principles it is proper and necessary to pay regard to State practice in the conclusion of delimitation agreements as a reflection of what States consider equitable.

6. In the practice of States, equidistance plays a predominant role. Before 1969, 76 per cent and after 1970, 83 per cent of all continental shelf delimitations involved the application of equidistance, even if in some cases this application was to some extent modified or simplified. Even if it cannot be said that this practice reflects a custom accepted as law, it is inconceivable that what has occurred should be regarded by the States concerned as anything other than equitable.

7. Libya's positive case rests upon the assertion of the existence of a fundamental discontinuity in geomorphological and geological terms in the area of the so-called Rift Zone. That is the positive basis on which Libya contends that the boundary should be drawn within and following the general direction of this Rift Zone. This contention is in law quite misplaced. The physical characteristics of the sea-bed and subsoil have no bearing on the situation save in terms of satisfying either the definition of the continental shelf or the definition of the exclusive economic zone as laid down in the 1982 Law of the Sea Convention. There is no doubt that the physical facts render the whole relevant area continental shelf and economic zone in the legal sense.

8. In any event, Libya has not established the existence of any fundamental geomorphological or geological discontinuity in the Rift Zone. In particular, one of its most important pieces of evidence — the gravity anomaly map — is open to severe criticism and can also be used to show another line of equal force in the area of the Tripolitanian Furrow which is much more favourable to Malta and much less favourable to Libya.

9. Generally, in concentrating its arguments in the Rift Zone Libya has failed to give due weight to the Jarrafa Trough and the Tripolitanian Furrow. These — in terms of Libya's own argument — are geomorphological and geological features of a significance comparable to those relied upon by Libya more to the north.

10. The whole of the sea-bed north of the eastern part of Libya and east of the Escarpment is covered by sediments 6 to 7 kilometres thick and is continental shelf, in the legal sense of that term, continuous with that of Malta to the west and Libya to the south. It has so been recognized by Italy and Greece.

Mr. President, that concludes my summary. I repeat my apologies for having had to re-convey to the Court much information it must have already possessed on technical matters and I hope that I have said enough to enable the Court to feel that it may safely set Libya's technical case aside. It remains for me, Mr. President, only to ask you to be so kind as to call upon my learned friend, Professor Weil.

## PLAIDOIRIE DE M. WEIL

### CONSEIL DU GOUVERNEMENT DE MALTE

M. WEIL: Monsieur le Président, Messieurs les juges, il n'est pas d'usage, lorsqu'un gouvernement vous fait le grand honneur de vous confier la défense de ses intérêts nationaux devant la Cour internationale de Justice, de commencer son intervention par une note personnelle.

La Cour ainsi que l'agent de Malte me pardonneront si je prends cette liberté pour évoquer la mémoire du grand juriste et du grand ami disparu prématurément il y a quelques mois. Il y a peu de temps encore le professeur Antonio Malintoppi était à cette même place, gravement malade déjà, mais tenant, au prix d'un effort surhumain, à assumer ses responsabilités jusqu'à l'extrême limite de ses forces. Que la Cour, qui a souvent eu l'occasion d'apprécier sa science et son talent, me permette de rendre hommage à ce brillant représentant de la grande école italienne de droit international, dont les qualités intellectuelles n'avaient d'égales que les qualités de cœur, et auquel m'attachaient depuis de longues années tant de liens.

Monsieur le Président, dans les affaires de délimitation maritime portées jusqu'ici devant la juridiction internationale, c'était l'application du droit aux faits plutôt que l'énoncé du droit qui était controversée. L'affaire actuellement devant la Cour se caractérise au contraire par l'existence de divergences fondamentales sur le droit lui-même. Ces différences vont bien au-delà de la question de savoir si la délimitation doit se faire dans notre affaire selon la méthode de l'équidistance ou selon quelque autre méthode ou combinaison de méthodes. C'est la quasi-totalité des éléments conceptuels mis en place par le droit international en vue de la construction d'un droit de la délimitation du plateau continental qui se trouve mise en discussion dans la présente affaire.

Les Parties sont d'accord — comment pourraient-elles ne pas l'être? — pour estimer que la délimitation de leur plateau continental doit être effectuée de manière à aboutir à un résultat équitable compte tenu de toutes les circonstances pertinentes. Mais cette convergence sur la finalité à poursuivre ne s'étend pas au cheminement permettant d'atteindre l'objectif recherché. Quel processus juridique de droit international envisage-t-il pour aboutir à une solution équitable compte tenu de toutes les circonstances pertinentes? Telle est en définitive la question; et sur cette question Malte et la Libye professent des vues diamétralement opposées.

L'abîme qui sépare les Parties sur ce problème est d'autant plus profond que la Partie libyenne, au lieu d'exposer une position cohérente, a choisi d'adopter la tactique des thèses multiples; tant et si bien que ce n'est pas à une thèse libyenne que nous sommes confrontés mais à un foisonnement de thèses qui prennent parfois le contrepied les unes des autres. Cette tactique n'est pas de nature à clarifier le débat.

Monsieur le Président, l'identification des composantes de la controverse juridique est difficile parce que ces composantes se croisent et s'entrecroisent en un écheveau malaisé à démêler. Aucun des éléments conceptuels qui composent le droit de la délimitation du plateau continental ne peut s'envisager en faisant abstraction des autres, à l'état pur, si j'ose dire; chacun d'eux ne se rencontre que dans un alliage avec un ou plusieurs autres. Il faut pourtant, pour les besoins de l'exposé, distinguer quelques thèmes majeurs autour desquels il soit possible d'ordonner les divergences juridiques fondamentales qui s'affrontent devant la Cour.

Après avoir évoqué, dans un premier chapitre, la question des sources du droit applicable, je consacrerai les chapitres suivants aux thèmes majeurs qui constituent, me semble-t-il, le pivot de la controverse.

Le chapitre II portera sur l'opération de délimitation.

Les chapitres III et IV se concentreront sur les deux concepts clés du plateau continental que sont le prolongement naturel et le principe de distance.

Dans le chapitre V, enfin, je m'attacherai à la question de l'équidistance et, plus particulièrement, à celle de la ligne médiane propre à notre affaire.

Quant au problème de la proportionnalité, c'est à mon ami le professeur Ian Brownlie qu'il reviendra de l'examiner.

Je crois devoir préciser, Monsieur le Président, qu'en vue d'alléger mon exposé je ne donnerai aucune référence juriprudentielle ou doctrinale. La Cour et la Partie adverse les trouveront dans le compte rendu, dans lequel figureront également les références aux passages pertinents des mémoires écrits libyens et maltais.

## I. LES SOURCES DU DROIT APPLICABLE

Quelles sont, dans notre affaire, les sources du droit applicable?

Nous sommes d'accord des deux côtés de la barre pour considérer que la convention de 1958 sur le plateau continental n'est pas applicable, que l'article 6 de cette convention est étranger au débat, et que ce sont en conséquence les principes et règles du droit coutumier qui régissent la présente délimitation

Au-delà de ce point évident, je crains qu'il ne faille se défendre d'un optimisme exagéré. Même si la Partie adverse a été plutôt discrète sur ce problème du droit applicable, et même si elle n'a pas contesté les positions que nous avons prises à ce sujet (**II**, CMM, p. 45-48, par. 76-82), les divergences demeurent considérables sur un point essentiel.

De l'avis de Malte, les règles de droit coutumier applicables comprennent certaines règles qui ont trouvé expression dans la récente convention sur le droit de la mer de 1982; ce n'est pas, bien sûr, en tant que règles conventionnelles que les dispositions en cause s'appliquent en ce cas, mais parce que ces dispositions peuvent être regardées comme consacrant ou cristallisant des règles de droit coutumier préexistantes ou en voie de formation. De manière plus large, comme l'a fait observer un membre de la Cour dans l'affaire du *Plateau continental (Tunisie/Jamahiriya arabe libyenne)*, c'est à l'ensemble des travaux de la troisième conférence qu'il convient de se référer lorsque l'on cherche à définir l'état du droit coutumier en ces matières (*C.I.J. Recueil 1982*, opinion dissidente de M. Oda, p. 172, par. 26).

En 1974, dans l'affaire de la *Compétence en matière de pêcheries*, la Cour avait, il est vrai, marqué une certaine réticence à tenir compte de ces travaux et des textes qui en sont issus (*C.I.J. Recueil 1974*, p. 23-24, par. 53), et cette réticence avait été partagée par le tribunal arbitral franco-britannique en 1977 (sentence arbitrale, par. 47 et 96). Mais on n'était encore en présence, à ce moment-là, selon les termes mêmes de la Cour, que de « propositions et documents préparatoires ... manifestant les thèses et les opinions d'Etats à titre individuel ... et traduisant leurs aspirations », et non pas de « principes du droit existant » (*C.I.J. Recueil 1974, loc. cit.*).

En 1982, au contraire, dans l'affaire *Tunisie/Libye*, la Cour a estimé que, puisque «le processus de formation du droit est aujourd'hui beaucoup plus avancé», il lui appartient à présent de «tenir compte d'office des travaux de la conférence», et qu'elle ne saurait en conséquence

> «négliger une disposition du projet de convention si elle venait à conclure que sa substance lie tous les membres de la communauté internationale du fait qu'elle consacre ou cristallise une règle de droit coutumier préexistante ou en voie de formation» (*C.I.J. Recueil 1982*, p. 37 et 38, par. 23 et 24).

Maintenant que le projet de convention est devenu une convention signée, et même ratifiée, par de nombreux Etats, l'analyse de la Cour s'impose avec plus de force encore. Il y a quelques semaines à peine, dans l'affaire de la *Délimitation de la frontière maritime dans la région du golfe du Maine*, la Chambre de la Cour, tout en rappelant que la convention de 1982 n'est pas encore entrée en vigueur, a relevé que certaines de ses dispositions ont fait l'objet d'un consensus et «peuvent être considérées comme conformes actuellement au droit international général en la matière» (*C.I.J. Recueil 1984*, p. 294, par. 94).

C'est dans cette perspective que Malte estime qu'il faut tenir compte, dans la présente délimitation, des règles de droit coutumier qui ont trouvé expression dans l'article 76 de la convention et dans les dispositions de la convention relative à la zone économique exclusive (CMM, p. 47-48, par. 80-82). En raison de l'importance que le paragraphe 1 de l'article 76 présente dans le débat, nous nous permettrons d'en reproduire le texte dans le compte rendu:

> «Le plateau continental d'un Etat côtier comprend les fonds marins et leur sous-sol au-delà de sa mer territoriale, sur toute l'étendue du prolongement naturel du territoire terrestre de cet Etat jusqu'au rebord externe de la marge continentale, ou jusqu'à 200 milles marins des lignes de base à partir desquelles est mesurée la largeur de la mer territoriale, lorsque le rebord externe de la marge continentale se trouve à une distance inférieure.»

L'opinion de Malte à ce sujet s'autorise de la position prise à cet égard par la Cour elle-même dans son arrêt de 1982. Dans cette décision la Cour a déclaré clairement que «la définition du paragraphe 1 de l'article 76 ne doit pas être perdue de vue» *(cannot be ignored)* (*C.I.J. Recueil 1982*, p. 48, par. 47), et que la zone économique exclusive peut être considérée «comme faisant partie du droit international moderne» (*ibid.*, p. 74, par. 100). Le «principe de distance» — c'est le terme employé par la Cour (*ibid.*, p. 49, par. 48) — figure en conséquence parmi les principes et règles du droit international coutumier dont il convient de tenir compte.

Voilà pour la position de Malte: elle est, on le constate, claire et simple.

La position de la Libye sur les règles issues de la troisième conférence est, quant à elle, beaucoup plus difficile à décrire.

Dans son premier écrit, la Libye cherchait à se mettre à l'abri de ces règles, et plus particulièrement du principe de distance, en soutenant que la convention de 1982 n'est pas en vigueur et ne fait pas droit entre les Parties (I, ML, p. 84, par. 6.10, et p. 89-90, par. 6.22). Sauf erreur de ma part, cet argument n'a plus refait surface dans les écrits ultérieurs, et c'est sur un autre terrain que la Libye a porté sa tentative de tenir le principe de distance à l'écart de notre affaire. La Libye cherche à présent à établir que le concept de distance intervient seulement sur le plan du titre juridique et des limites extérieures, par opposition à la délimitation; que même sur le plan du titre juridique et des limites extérieures, il ne joue qu'un rôle subsidiaire; et que la zone économique exclusive, qui est son domaine d'élection, est étrangère à la présente affaire, puisque celle-ci ne met en cause que la délimitation du plateau continental et ne préjuge pas la délimitation d'une éventuelle zone économique exclusive entre les deux pays.

Faut-il en conclure que désormais la Partie adverse reconnaît le caractère de droit coutumier des règles incorporées dans les dispositions pertinentes de la convention? Peut-être nous éclairera-t-elle là-dessus au cours de la procédure orale.

Ce qu'il me faut en tout cas constater, c'est que la Libye passe complètement sous silence dans ses écrits la profonde évolution subie par les règles coutumières relatives au plateau continental et à sa délimitation. Elle oublie que le droit coutumier n'est pas immuable, et que c'est à la lumière du droit coutumier tel qu'il existe à un moment donné que les concepts relatifs au plateau continental et à la délimitation doivent être compris et appliqués.

Monsieur le Président, la Cour a déclaré: «La notion de prolongement naturel est et demeure ... une notion à examiner dans le contexte du droit coutumier et de la pratique des Etats» (*C.I.J. Recueil 1982*, p. 46, par. 43).

Prenant le contrepied de l'approche dynamique ainsi adoptée par la Cour, la Libye paraît tenir pour nulle et non avenue l'évolution du concept de plateau continental sur lequel la Cour a si fortement mis l'accent; elle ignore le détachement progressif de ce concept des données physiques de la géologie et de la géomorphologie, ainsi que son évolution vers une conception juridique fondée sur une relation spatiale entre les espaces sous-marins et les côtes. En présentant à la Cour une revendication construite sur les caractéristiques du sol et du sous-sol de la mer, la Libye plaide comme on aurait pu le faire il y a quinze ans. Si elle semble admettre le caractère coutumier des règles pertinentes de la convention de 1982, elle ne le fait que du bout des lèvres et sans en tirer de conséquences. La thèse libyenne ne serait pas différente si ces règles n'étaient pas applicables.

Dans la même perspective, la Partie adverse nie en bloc toute pertinence du concept de zone économique exclusive à propos de la délimitation du plateau continental dans la présente affaire. Dans son contre-mémoire, la Libye insiste sur le fait que seule est demandée la délimitation des fonds marins et du sous-sol, à l'exclusion de toute délimitation de la colonne d'eau surjacente et, plus particulièrement, des zones de pêche (**II**, CML, p. 62, par. 3.14 et note 1; p. 71, par. 3.39). La réplique libyenne adopte une position plus radicale encore: elle passe totalement sous silence le problème; de la zone économique exclusive il n'est tout simplement plus question.

Il est évident, Monsieur le Président, que la Cour n'est saisie dans la présente affaire que de la délimitation du plateau continental; le compromis ne laisse pas de doute sur ce point et nous en sommes d'accord. Ni Malte ni la Libye n'ont d'ailleurs proclamé jusqu'ici une zone économique exclusive, et Malte a proclamé une zone de pêche de 25 milles. On ne saurait toutefois ignorer que l'une ou l'autre Partie, ou les deux, peuvent à tout moment procéder à une telle proclamation. Il ne faut pas oublier que le tribunal arbitral franco-britannique a estimé devoir tenir compte, pour la délimitation du plateau continental des îles Anglo-Normandes, de la possibilité reconnue par le droit international au Royaume-Uni de porter sa mer territoriale, qui était alors de 3 milles, à la largeur de 12 milles autorisée par le droit international (sentence arbitrale, par. 187).

Mais là n'est pas la seule raison interdisant d'évacuer les règles coutumières sur la zone économique exclusive du présent débat, même si celui-ci ne porte directement que sur la délimitation du plateau continental. On ne peut faire abstraction de ce que la zone économique exclusive confère à l'Etat côtier, jusqu'à une distance de 200 milles marins, aux termes de l'article 56 de la convention de 1982, des droits souverains sur les ressources naturelles, non seulement des eaux surjacentes, mais également et en même temps des fonds marins et de leur sous-sol. On ne peut pas faire abstraction non plus de ce que les droits de plateau continental s'étendent aujourd'hui, comme l'énonce l'article 76, à tout le moins jusqu'à la limite extérieure de la zone économique exclusive. Il existe ainsi une corrélation certaine — je ne dis pas: une coïncidence ou une identité totales — entre les concepts de plateau continental et de zone économique exclusive, et il paraît impossible, aujourd'hui, sous peine de perdre de vue l'évolution du droit coutumier de la mer, d'aborder une délimitation du plateau continental en faisant purement et simplement le silence sur le concept de zone économique exclusive. C'est pourtant là l'attitude que la Partie adverse paraît avoir adoptée.

Il reste, Monsieur le Président, pour compléter ce rapide inventaire des sources du droit applicable, à évoquer l'article 83 de la convention de 1982 sur le droit de la mer intitulé: « Délimitation du plateau continental entre Etats dont les côtes sont adjacentes ou se font face »:

> « La délimitation du plateau continental entre Etats dont les côtes sont adjacentes ou se font face est effectuée par voie d'accord conformément au droit international tel qu'il est visé à l'article 38 du Statut de la Cour internationale de Justice, afin d'aboutir à un résultat équitable. »

Il n'est pas inutile de rappeler que cette disposition a été introduite dans le projet de convention le dernier jour de la conférence, le 28 août 1981, sauf erreur de ma part, à la suite de contacts pris entre des délégations représentant respectivement le président de la conférence et les deux groupes d'Etats qui s'étaient opposés jusque-là au sein du groupe de négociation 7. Son introduction dans le projet de convention suscita des réserves de la part d'une douzaine d'Etats, qui estimaient n'avoir pas eu le temps d'étudier le texte. D'autres délégations, semble-t-il, exprimèrent leurs réticences en privé. Je puise ces indications dans une opinion qui accompagne l'arrêt de 1982 (*C.I.J. Recueil 1982*, opinion dissidente de M. Oda, p. 245, par. 142) dans une étude du professeur Oxman, vice-président de la délégation américaine (*American Journal of International Law*, vol. 76, 1982, p. 14).

Il faut toutefois noter que la conférence n'est parvenue à mettre fin ainsi, *in extremis*, à une controverse qui l'avait divisée pendant des années qu'au prix d'une véritable stérilisation de la substance même du texte.

D'abord parce que la disposition adoptée se borne, selon l'expression du professeur Caflisch, à une « exhortation adressée aux négociateurs » (« Les zones maritimes sous juridiction nationale », dans *Le nouveau droit international de la mer*, Paris, Pedone, 1983, p. 102); elle n'énonce aucune règle qui s'adresserait, en l'absence d'accord, au juge ou à l'arbitre international. C'est ce que souligne également le professeur Oxman (*loc. cit.*).

D'autre part, même en tant que directive destinée à inspirer les gouvernements dans leurs négociations, le texte se révèle comme dépourvu de toute substance réelle. Pour obtenir un semblant de consensus, les rédacteurs du texte ont en effet supprimé toute mention de l'un comme de l'autre des deux concepts qui s'étaient affrontés pendant des années: plus d'« équidistance », plus de « principes équitables ». « Dans le nouveau texte, a constaté la Cour, toute indication d'un critère spécifique pouvant aider les Etats intéressés à parvenir à une solution équitable a disparu » (*C.I.J. Recueil 1982*, p. 49, par. 50). Comme le souligne l'opinion que j'ai déjà citée, l'article 83 « ne répond pas à la question de savoir en quoi consiste [la] solution équitable, ni quelle est la méthode à appliquer pour y aboutir »; il énonce, dit la même opinion, « une règle fourre-tout, capable de satisfaire les uns et les autres », et il est difficile d'en « extraire ... un sens positif » (*C.I.J. Recueil 1982*, p. 246 et 247, par. 143 et 144). Les auteurs ne s'y sont pas trompés: «a text that says nothing of significance», estime le professeur Oxman (*op. cit.*, p. 15); «illustration saisissante» d'une «ambiguïté délibérée», déclare de son côté le professeur Quéneudec (rapport au colloque de Rouen de la Société française pour le droit international, *Perspectives du droit de la mer à l'issue de la troisième conférence des Nations Unies*, Paris, Pedone, 1984, p. 149).

Tant par les conditions de son adoption que par son contenu, l'article 83 de la convention sur le droit de la mer ne saurait donc être regardé comme constituant à lui seul le *corpus juris* du droit applicable par la Cour en l'absence d'un accord entre les Etats intéressés. S'il indique l'objectif à atteindre, indication précieuse bien entendu, il est muet sur la voie à suivre pour y parvenir. L'article 83 se borne à énoncer un standard et, comme dans tous les ordres juridiques, c'est au juge qu'il appartient de doter ce standard d'un contenu effectif: «texte succinct», observe l'arrêt du *Golfe du Maine*, qui «ouvre la porte à la poursuite du développement résultant de la jurisprudence internationale en la matière» (par. 95).

Par leur compromis, les Parties ont demandé à la Cour de leur indiquer «quels sont les principes et règles de droit international qui sont applicables» à la délimitation de leur plateau continental. Dès lors que les Parties sont d'accord sur la nécessité juridique d'un résultat équitable et que leur différend porte uniquement sur les moyens pour y parvenir conformément au droit international, il appartient à la Cour, de l'avis de Malte, de définir quels sont, selon le droit international, les principes et règles régissant l'opération même de délimitation et non plus seulement le résultat. Et, pour cela, l'article 83, quelque précieux qu'il soit en ce qui concerne la finalité à poursuivre, n'est malheureusement d'aucun secours.

## II. L'OPÉRATION DE DÉLIMITATION

J'en arrive ainsi, Monsieur le Président, au second foyer de divergence, à savoir le cheminement juridique conduisant à une délimitation conforme au droit international. C'est ce cheminement que la Cour a désigné en 1969, puis à nouveau en 1982, du nom de «process of delimitation» (*C.I.J. Recueil 1969*, p. 22, par. 18 et 20; *C.I.J. Recueil 1982*, p. 47, par. 44, et p. 77, par. 106). En 1969 le terme était traduit en français par la Cour par «opération de délimitation»; en 1982 il l'a été par «processus de délimitation», mais l'idée est la même dans les deux cas. La Chambre de la Cour a repris le vocable d'«opération de délimitation» dans son arrêt de 1984 dans l'affaire du *Golfe du Maine* (*C.I.J. Recueil 1984*, p. 300, par. 115, et *passim*). C'est sur la structure de cette opération que portent certaines des divergences les plus profondes entre les Parties.

Il me paraît nécessaire d'identifier les positions des Parties sur cette question capitale, avant d'exposer les vues de Malte sur l'opération de délimitation et sur les relations entre le titre juridique et la délimitation.

A ces trois aspects — les positions des Parties, le contenu de l'opération de délimitation, les relations entre titre et délimitation — seront consacrées les trois sections de ce chapitre.

*L'audience est levée à 12 h 52*

## DOUZIÈME AUDIENCE PUBLIQUE (29 XI 84, 10 h)

*Présents* : [Voir audience du 26 XI 84.]

M. WEIL : Monsieur le Président, Messieurs les juges, comme je l'ai indiqué hier, mon exposé sera articulé autour de quatre des cinq thèmes qui forment, me semble-t-il, les composantes de la controverse juridique, le cinquième — la proportionnalité — devant être traité par mon ami Ian Brownlie.

J'ai examiné brièvement la question du droit applicable par les Parties et j'ai abordé celle de l'opération de délimitation, en précisant que je m'attacherai successivement aux positions des Parties, au contenu de l'opération de délimitation et aux relations entre titre et délimitation.

### *I. Les positions des Parties*

Comment, par quelle voie, parvenir à cette solution équitable qui constitue la finalité indiscutée de l'exercice de délimitation? Sur cette question fondamentale, quelles sont les positions des Parties?

La position de Malte, énoncée avec clarté dans nos écritures (**II**, CMM, p. 58-61, par. 108-117; p. 74-83, par. 152-176), se résume en quelques mots. L'opération de délimitation doit s'enraciner dans le fondement juridique du titre de l'Etat côtier à des droits de plateau continental, et son point de départ doit, en conséquence, être en rapport avec ce fondement juridique. Ce premier pas n'épuise cependant pas la question, car, pour être conforme au droit international, il ne suffit pas que la délimitation soit ancrée dans le droit, elle doit également aboutir à une solution équitable. C'est pourquoi ce premier pas se prolonge nécessairement par la vérification de l'équité du résultat, vérification qui s'opère par la confrontation du résultat aux circonstances pertinentes de l'affaire, et, s'il y a lieu, par sa soumission au test de proportionnalité. Contrairement à celle de Malte, la thèse de la Libye ne se prête pas à un bref résumé. Nous aurions aimé pouvoir défendre la philosophie maltaise, si j'ose dire, de l'opération de délimitation face à une approche libyenne bien définie. Une controverse à visage découvert est toujours préférable à un combat dans l'ombre. Il nous faut cependant constater, à notre grand regret, que la Partie adverse a choisi la stratégie du brouillard, nous rendant ainsi la tâche particulièrement difficile.

Deux courants contradictoires traversent en effet les écritures libyennes. Dans le mémoire libyen, la délimitation proposée est dominée par le concept qui constitue, selon la Libye, le fondement juridique du titre de l'Etat côtier au plateau continental, c'est-à-dire le prolongement naturel. Dans la réplique libyenne, au contraire, la délimitation demandée est présentée comme dictée par les circonstances de fait, en dehors de toute prise en considération du titre juridique au plateau continental. A partir de là, les conceptions libyennes se ramifient à l'extrême, et ce n'est pas sans quelque scrupule que j'invite la Cour à me suivre dans le labyrinthe — dépourvu hélas! de fil d'Ariane — des thèses adverses.

Avant d'engager la Cour dans les flottements et contradictions des thèses libyennes, je voudrais cependant apporter une précision d'ordre terminologique.

Je vais être amené, comme mes collègues, à utiliser le terme de *Rift Zone*, et je tiens à répéter ce qui a déjà été dit par eux. Même utilisé avec un *R* et un *Z* majuscules, cette expression ne correspond à aucune désignation toponymique connue ou reconnue. Qu'il y ait eu dans cette région des phénomènes de *rifting* n'autorise pas à désigner cette région par ce vocable à l'apparence scientifique qui peut donner l'impression que l'on serait en présence de *la* zone de *rifting* par excellence. Les mêmes phénomènes de *rifting* se sont produits ailleurs entre Malte et la Libye, et bien entendu ailleurs dans le monde. Je n'emploierai donc, comme mes collègues, le terme de *Rift Zone* que pour apporter la contradiction à la Libye.

C'est pour cette raison que je m'en tiendrai à l'appellation anglaise utilisée par la Partie adverse, sans essayer de la traduire en français.

Une seconde raison milite dans le même sens. J'aurais pu recourir à l'expression «zone d'effondrement», choisie par les traducteurs et par les interprètes de la Cour. Si je ne l'ai pas fait, c'est parce que ce terme évoque pour le profane que je suis un «collapse» d'une certaine envergure, un effondrement, et crée l'image d'une vaste zone dans laquelle le fond marin se serait effondré, laissant la place à un vaste trou. Or, d'après les informations que j'ai recueillies, car je ne suis pas homme de science, l'expression «zone d'effondrement» ne comporte scientifiquement aucune connotation dimensionnelle. Comme le mémoire libyen le précise à juste titre:

> «The terms *rift*, *rifting*, *rift valley* and *rift zone* may be understood through the definition of *rift*: a geomorphological term describing a narrow cleft, fissure or other opening in rock, made by cracking or splitting.» (I, ML, p. 29, note 3.)

Ce serait une erreur de s'imaginer cette soi-disant *Rift Zone* comme une espèce de gigantesque fosse dans laquelle le lit de la mer se serait effondré. D'abord parce qu'on n'est pas en présence d'une zone homogène, mais d'un assemblage d'accidents naturels divers. Le mémoire libyen n'en fait pas mystère:

> «The *various* features that will be discussed here combine to make up a *rift* zone (hereinafter referred to as the "Rift Zone") — a *feature* of major importance to this case . . .» (*Ibid.*, par. 3.12.) (Les italiques sont de moi.)

Le glissement sémantique ne saurait être plus clair. Ensuite parce que cette soi-disant zone est constituée d'une succession de hauts et de bas, de creux et de crêtes. Les creux les plus profonds — qui ne dépassent pas 1715 mètres — sont ceux des fosses de Pantelleria, Malte et Linosa: ils se trouvent tous, comme mon ami Elihu Lauterpacht l'a montré hier, à l'ouest et au sud-ouest de Malte et, sauf pour l'extrémité de la fosse de Malte, sont étrangers à la délimitation entre Malte et la Libye. Quant aux chenaux de Malte et de Medina, qui, eux, intéressent pleinement notre délimitation, leur profondeur ne dépasse guère 500 mètres : on comprend que leur présence gêne visiblement la partie adverse.

Voilà la seconde raison pour laquelle je n'ai pas cru devoir utiliser la traduction française de «zone d'effondrement».

Troisième raison enfin, qui explique que je conserverai l'appellation libyenne en anglais de *Rift Zone*: le mot anglais *rift* est, paraît-il, utilisé couramment par les scientifiques de langue française, et les traducteurs de la Cour eux-mêmes ont rendu *rift* par *rift* dans la version [1] française du mémoire libyen qu'ils ont préparée à l'intention des membres de la Cour.

Je referme cette parenthèse terminologique, et je prie maintenant respectueusement la Cour de bien vouloir m'accompagner pendant quelques minutes dans le dédale des positions libyennes.

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[1] Non reproduite. *[Note du Greffe.]*

Voyons d'abord la première approche de nos adversaires, qui se dédouble elle-même en deux hypothèses.

Dans cette première approche, qui est celle du mémoire, la Libye aboutit à une revendication axée sur la soi-disant *Rift Zone* à partir d'un processus de délimitation exprimant ce que la Libye appelle la relation conceptuelle entre prolongement naturel et délimitation *(the conceptual relationship between natural prolongation and delimitation)* (**I**, ML, p. 83, par. 6.09). Selon la Libye, deux situations doivent être distinguées.

Première situation. Lorsqu'on est en présence, comme le mémoire libyen soutient que c'est le cas dans notre affaire, de deux prolongements naturels physiquement distincts, l'opération de délimitation, explique le mémoire libyen, part du titre juridique des parties à un plateau continental, c'est-à-dire, selon la Libye, du concept de prolongement naturel. En l'espèce c'est donc, explique toujours le mémoire libyen, avec l'identification de la séparation naturelle «indiquée» par la soi-disant *Rift Zone* et par la zone des escarpements que le processus commence. Après quoi, nous dit le mémoire libyen, il faut vérifier si cette délimitation conduit à un résultat équitable à la lumière des circonstances pertinentes de l'affaire, et c'est seulement aux termes de cette vérification que la délimitation indiquée par le titre juridique peut devenir la délimitation définitive (*ibid.*, p. 91, par. 6.25; p. 113, par. 6.86; p. 133, par. 8.18; p. 153, par. 9.64; p. 154, par. 10.01).

Dans cette première hypothèse, prétendument réalisée dans notre affaire, d'une séparation entre deux plateaux continentaux physiquement distincts, le processus de délimitation, tel que le décrit le mémoire libyen, présente, on le constate, trois caractéristiques majeures. D'abord, l'opération de délimitation repose sur l'idée que titre juridique et délimitation marchent la main dans la main *(go hand in hand)* (**I**, ML, p. 83, par. 6.09; cf. **II**, CML, p. 56, par. 2.84). En second lieu, le processus de délimitation part, à titre de premier pas, de la prise en considération du titre juridique au plateau continental (le prolongement naturel, selon la Libye) et se poursuit avec la vérification de l'équité du résultat grâce à la confrontation avec les circonstances pertinentes. Enfin, troisième trait: c'est la nature qui précise elle-même (*points up*; **I**, ML, p. 132, par. 8.13) la délimitation à retenir: selon la Libye, une zone frontière divisant les prolongements naturels des parties peut être dans notre cas physiquement identifiée (*ibid.*, p. 134, par. 9.02).

Voilà pour la première hypothèse exposée dans le mémoire.

Seconde situation. La seconde situation envisagée par le mémoire libyen — toujours dans le cadre de l'approche du mémoire — concerne les cas dans lesquels il n'existe qu'un seul plateau continu, qui constitue le prolongement naturel aussi bien de l'un que de l'autre des deux Etats. En ce cas, nous dit-on, les caractéristiques géologiques et géomorphologiques des fonds marins et de leur sous-sol ne revêtent plus le caractère de discontinuité fondamentale indicative par elle-même d'une frontière maritime; elles cessent d'être déterminantes *(determinative, conclusive)* pour la délimitation et sont simplement à prendre en considération comme des circonstances pertinentes parmi d'autres (*ibid.*, p. 83, par. 6.09; p. 91 et 92, par. 6.26 à 6.28; p. 102, par. 6.55).

Dans cette seconde situation le tableau n'est plus le même. D'abord, nous dit-on, titre juridique et délimitation (qui tout à l'heure allaient «hand in hand») n'ont maintenant plus de corrélation nécessaire (**I**, ML, p. 83, par. 6.09). Ensuite, nous dit-on, il n'y a plus cette fois-ci ni premier pas axé sur le titre juridique ni vérification par la mise en balance des circonstances pertinentes: le processus se réduit à la seule prise en considération des circonstances pertinentes, au sein desquelles les catactéristiques physiques du sol et du sous-sol trouvent leur place parmi d'autres (**I**, ML, p. 92, par. 6.28). Enfin, et par voie de conséquence, ce n'est plus, cette fois-ci, la nature, mais la mise en balance des circonstances pertinentes, qui indique la frontière (**I**, ML, p. 91 et 92, par. 6.26 à 6.29; p. 102, par. 6.55).

Selon le mémoire libyen, je le rappelle, ce n'est pas cette seconde hypothèse qui se trouve réalisée dans notre affaire, mais la première, celle de l'existence de deux prolongements naturels physiquement distincts (*ibid.*, p. 102, par. 6.54; p. 127, par. 8.01; p. 132, par. 8.13; p. 133, par. 8.17).

Voilà, Monsieur le Président, Messieurs les juges, la première des deux lignes de pensée exposées par la Libye, celle qu'elle a exposée au stade du mémoire.

Dans la réplique libyenne apparaît une seconde approche, très différente.

Dans cette deuxième approche la distinction, présentée par le mémoire comme majeure, entre les situations à plateaux physiquement séparés et les situations à plateau continu est passée sous silence, oubliée, effacée. Dans notre cas, nous dit-on à présent, comme dans tous les autres, titre juridique et délimitations sont toujours fondamentalement séparés. Dans notre cas, nous dit-on, comme dans tous les autres, l'opération de délimitation, loin de comporter un point de départ ancré dans le titre juridique, commence directement par la prise en considération et la mise en balance des faits. Le résultat, c'est-à-dire la délimitation, nous dit-on, est le produit de cette mise en balance (ci-dessus, RL, p. 90, par. 7.15).

En d'autres termes, les caractéristiques physiques des fonds marins, quelle que soit la situation, ne conduisent plus jamais à elles seules à mettre en évidence la délimitation; elles ne sont jamais que des circonstances pertinentes parmi d'autres, et c'est la mise en balance de l'ensemble de ces circonstances qui conduit à *(points to, points towards)* la solution équitable. Voilà ce que l'on nous explique abondamment dans la réplique (par exemple: ci-dessus, RL, p. 7, par. 1.04; p. 81, par. 6.17; p. 84, par. 6.23; p. 98-99, par. 8.15). Dans cette nouvelle optique, on le constate, les circonstances de fait ne remplissent plus jamais la fonction d'une vérification du résultat indiqué par le titre juridique, c'est-à-dire par le prolongement naturel; elles conduisent toujours directement à la solution. C'est toujours par la prise en considération des faits, nous dit-on en toutes lettres, que «l'exercice de délimitation commence» (ci-dessus, RL, p. 88, par. 7.09); ce sont toujours les faits de l'espèce qui constituent «le point de départ» de la délimitation (*ibid.*, p. 98, par. 8.14). Mais écoutons la réplique adverse nous décrire elle-même cette nouvelle approche:

> «Libya examines the facts, opening up the map, observing the coasts of the Parties . . . and all the geographical, geomorphological and geological features. Other factors such as the presence of third States and the conduct of the Parties are examined.» (*ibid.*, p. 96, par. 8.09.)

Après quoi il convient, toujours selon la description adverse, de déterminer, parmi les faits ainsi relevés,

> «which ones are relevant and how much weight should be accorded those that are relevant in order to reach an equitable result. . . . What then remains is for the result that emerges from the facts to be tested by means of the element of proportionality.» (*Ibid.*, *loc. cit.* et p. 99, par. 8.15.)

La *Rift Zone*, la *Rift Zone*, la *Rift Zone*: voilà en quoi se concentre en définitive, par-delà des distinctions et sous-distinctions, la revendication libyenne. Mais, Monsieur le Président, c'est une revendication, ce n'est pas une thèse. Car, pour peu que l'on pose la question: pourquoi — j'entends: pourquoi en droit — la *Rift Zone*? la consultation des écritures libyennes, je crois l'avoir montré, produit des réponses à peu près aussi claires et cohérentes que celles de la pythie de Delphes.

De contradiction en nuance, de nuance en contradiction, l'analyse conceptuelle — c'est le mot employé par nos adversaires — qui prétend sous-tendre la revendication de la *Rift Zone* finit par échapper à l'entendement.

Pourquoi, Monsieur le Président, pourquoi titre et délimitation marchent-ils «la main dans la main» dans certains cas et évoluent-ils sur des planètes différentes dans d'autres?

Comment comprendre que l'on nous décrive longuement un processus comportant un «premier pas» suivi d'une vérification par les circonstances pertinentes (**I**, ML, p. 113, par. 6.86) et qu'en même temps on proclame avec indignation que «tout le concept d'une «délimitation primaire» est étranger à la pensée de la Libye» (ci-dessus, RL, p. 94, par. 8.03)?

Comment accepter que Malte soit accusée — et sur quel ton! — une fois, dix fois, vingt fois de négliger les faits, de *leap-frog*, de «jouer à saute-moutons» avec eux, de préconiser à la place un schéma purement abstrait dans lequel les faits seraient réduits au rôle subalterne de «facteurs subsidiaires» (ci-dessus, RL, p. 25, par. 3.17)? Mais la Partie adverse aurait-elle oublié que c'est elle — et non pas Malte — qui a exposé dans cette affaire une série de distinctions d'une complexité qui défie le bon sens; que c'est elle — et non pas Malte — qui a la première parlé de «premier pas» et qui a la première introduit dans le débat l'idée d'une délimitation primaire et d'une espèce de présomption; que c'est elle — et non pas Malte — qui a la première proposé à la Cour une délimitation fondée sur la prise en considération du titre juridique et sur la vérification ultérieure de l'équité du résultat par les circonstances pertinentes et le test de proportionnalité (voir **I**, ML, p. 91, par. 6.25; p. 133, par. 8.18; p. 101, par. 6.51; p. 153, par. 9.64)? Avant de nous accabler de ses sarcasmes et de tourner en dérision notre prétendue «abstraction», la Partie adverse aurait dû prendre la précaution de relire ses propres écrits.

Et comment, Monsieur le Président, comment se laisser convaincre par les vertueuses protestations du genre: «La Libye n'a jamais avancé la proposition que la *Rift Zone* constitue *per se* une frontière maritime naturelle entre les Etats» (ci-dessus, RL, p. 82, par. 6.19; cf. p. 7, par. 1.04)? Aurions-nous rêvé lorsque nous avons lu des dizaines de fois, à travers le mémoire, le contre-mémoire et la réplique libyennes que la *Rift Zone* constitue une *«fundamental»*, une *«major discontinuity»* qui *«arrests»* le prolongement naturel des deux pays et qui constitue la limite à la fois de leurs titres et de leurs zones respectives, qui «rompt la continuité du plateau» et qui met en évidence de ce fait «une frontière suivant cette division» (**I**, ML, p. 89, par. 6.21; p. 102, par. 6.54; p. 154, par. 10.01; p. 134, par. 9.02; **II**, CML, p. 23, par. 2.05; p. 86, par. 4.22; p. 166, par. 8.04; p. 167, par. 8.10; ci-dessus, RL, p. 28, par. 3.27; p. 44, par. 4.32)? Aurions-nous été victimes d'un phantasme lorsque nous avons cru voir évoquer une comparaison avec le Rhin et le Mississipi «qui [est-il écrit dans le contre-mémoire libyen] forment des frontières entre des entités politiques» (**II**, CML, p. 53, note 1)? Et avons-nous eu des visions lorsque nous croyons lire, dans les conclusions finales des trois écrits libyens, que

> «there exists a fundamental discontinuity in the sea-bed and subsoil which divides the areas of continental shelf into two distinct natural prolongations extending from the land territories of the respective Parties» (Conclusion n° 4)?

Lorsque la nature indique une séparation et que cette séparation devient par là-même une frontière, est-ce autre chose, Monsieur le Président, Messieurs les juges, que ce que l'on appelait autrefois une frontière naturelle?

Comment, enfin, appréhender une thèse qui, d'un côté, est bâtie sur l'existence de deux plateaux continentaux séparés physiquement par une «discontinuité fondamentale» et sur la négation radicale de tout «continuum» géologique et géomorphologique, et qui, d'un autre côté, constate — en toutes lettres — que l'ensemble du lit de la mer Pélagienne et de la mer Ionienne relève de la définition que l'article 76 donne de la «marge continentale» (ci-dessus, RL, p. 21, note 2)?

Monsieur le Président, il ne nous appartient pas de diagnostiquer les raisons de cet éclatement de la thèse libyenne. Peut-être dirais-je simplement que la peur du concept de distance ne nous paraît pas étrangère à cette accumulation de contradictions. Pour tenter d'échapper au principe de distance, la Libye a cherché d'abord à le reléguer dans le domaine du titre juridique et des limites extérieures et à ériger un écran coupe-feu entre le monde du titre et celui de la délimitation. C'est seulement dans l'hypothèse où elle aurait pu faire accepter comme titre le prolongement naturel au sens physique du terme qu'elle aurait admis — et avec enthousiasme alors — la corrélation entre titre et délimitation. Mais sans doute était-ce encore trop dangereux à ses yeux. Aussi la Libye suggère-t-elle d'aller plus loin. Elle veut à présent qu'en toute hypothèse titre et délimitation soient séparés, et c'est dans ce but, me semble-t-il, qu'elle réduit à présent l'opération de délimitation à la simple mise en balance des faits sans aucune prise en considération du titre juridique. De cette manière *exit* le titre, *exit* la distance, *exit* la zone économique exclusive: nous sommes dans le monde clos des faits et des circonstances pertinentes, et dans ce monde restreint, espère la Libye, point de place pour les considérations de distance venues du monde lointain du titre juridique.

Peut-être aussi la Libye a-t-elle cherché tout simplement à jouer sur plusieurs tableaux à la fois, espérant ainsi mettre davantage de chances de son côté. A la manière de la chauve-souris de la fable de La Fontaine, elle a peut-être choisi de présenter à la Cour un double visage juridique, l'un qui exprime le titre juridique, l'autre qui ne reflète que les faits:

> «Je suis oiseau; voyez mes ailes...
> Je suis souris; vivent les rats!»

Quoi qu'il en soit, rien ne saurait mieux mettre en lumière la difficulté que nous éprouvons à nous battre contre des thèses qui s'évanouissent aussitôt que nous tentons de les appréhender.

Il existe, écrit la Libye, entre les Parties des «différences fondamentales quant au cadre juridique dans lequel la délimitation doit être effectuée» (ci-dessus, RL, p. 5, par. 12), et la Libye a raison. Mais ce qu'elle oublie de dire, c'est qu'il existe aussi, à presque tous les niveaux, des «différences fondamentales» entre les diverses conceptions juridiques énoncées simultanément par elle-même.

Nul doute, Monsieur le Président, qu'il soit indispensable de mettre un peu d'ordre dans ce débat que les écrits adverses ont à ce point obscurci. Au risque de nous faire accuser à nouveau d'abstraction, je voudrais soumettre à ce sujet quelques observations sur les aspects les plus controversés de la discussion. L'impressionnisme juridique peut servir de tactique ou de rideau de fumée. Il ne suffit pas à faire du bon droit.

C'est dans cette perspective que je me tourne maintenant avec votre permission, Monsieur le Président, vers la structure et le contenu de l'opération de délimitation.

## 2. *Structure et contenu de l'opération de délimitation*

Il est certain, Monsieur le Président, que la délimitation du plateau continental doit s'effectuer conformément à des principes équitables en vue d'aboutir à une solution équitable. La Partie adverse croit nécessaire de nous rappeler ce principe à tout moment, comme si nous avions jamais soutenu le contraire. Qu'elle se rassure: nous sommes parfaitement d'accord avec elle sur ce point.

De même sommes-nous d'accord des deux côtés de la barre pour estimer que les principes équitables comportent essentiellement l'obligation de prendre en considération et de mettre en balance les circonstances pertinentes propres à notre affaire. Dans sa plaidoirie dans l'affaire des *Pêcheries*, Maurice Bourquin faisait observer que:

> «Prétendre soumettre toutes les situations à des règles précises et rigoureuses, qui s'appliqueraient uniformément sans tenir compte des réalités..., c'est aller au-devant d'un échec ... parce que c'est poursuivre une idée fausse.» (*C.I.J. Mémoires*, vol. V, p. 511.)

Et un peu plus tard Charles De Visscher évoquait dans le même esprit les «éléments individualisateurs constitutifs de l'équité» (*De l'équité dans le règlement arbitral ou judiciaire des litiges de droit international public*, Paris, Pedone, 1972, p. 13). C'est cette même idée que la Cour a récemment exprimée dans une formule frappante:

> «Ce qui est raisonnable et équitable dans un cas donné dépend forcément des circonstances, et à coup sûr il est virtuellement impossible, dans une délimitation, d'aboutir à une solution équitable en méconnaissant les circonstances propres à la région.» (*C.I.J. Recueil 1982*, p. 60, par. 72.)

Il y a quelques semaines l'arrêt du *Golfe du Maine* confirmait cette approche à de nombreuses reprises: «chaque cas concret est finalement différent des autres», énonce-t-il, «il est un *unicum*» (par. 81; cf. par. 163, 219, etc.).

Bref, l'équité, c'est avant tout la prise en considération de la spécificité de chaque cas; ce n'est jamais, comme je me suis déjà permis de le dire ici, la même eau qui coule sous le même pont.

Il est certain, dès lors, comme nous l'avons écrit, que «les circonstances pertinentes sont toujours présentes dans le processus de délimitation» (**II**, CMM, p. 60, par. 114). Jusqu'ici je ne pense pas que la Partie adverse se séparera de nous.

Est-ce à dire pour autant que l'opération de délimitation doive se limiter à la prise en considération des circonstances pertinentes, et que cette dernière l'occupe en quelque sorte tout entière?

C'est ce que soutient la Libye dans la seconde des approches qu'elle a adoptées dans ses écritures, celle exposée dans sa réplique, celle selon laquelle l'exercice de délimitation commencerait immédiatement et directement par la prise en considération des faits de l'espèce, le résultat équitable étant censé émerger directement de ces faits.

Monsieur le Président, Malte ne souscrit pas à une telle approche. Pour Malte les circonstances pertinentes doivent être «prises en considération» par le juge, mais elles ne sauraient être tenues pour un facteur primaire, direct et exclusif de la délimitation.

La mission du juge ou de l'arbitre, telle que Malte la conçoit, ne peut se ramener à celle d'un ordinateur qui tirerait automatiquement des faits de l'espèce une solution prédéterminée. Il n'y a pas, avons-nous écrit, de *diktat* des circonstances pertinentes (**II**, CMM, p. 59, par. 109, et p. 60, par. 113). Pas davantage ne saurait-il être question de concevoir l'opération de délimitation sous la forme d'une décision purement discrétionnaire que le juge tirerait de l'examen des circonstances de fait. La Cour a fait clairement savoir, en 1969 d'abord, puis en 1982, qu'en préconisant la prise en considération des circonstances particulières de chaque espèce concrète, elle n'envisage ni une décision *ex aequo et bono*, ni l'« exercice d'un pouvoir discrétionnaire ou de conciliation », ni le « recours à la justice distributive » (*C.I.J. Recueil 1969*, p. 48, par. 88; *C.I.J. Recueil 1982*, p. 60, par. 71). La Chambre a noté de son côté, dans l'affaire du *Golfe du Maine*, qu'elle était tenue « non pas de décider *ex aequo et bono*, mais d'asseoir le résultat à atteindre sur une base de droit » (par. 59). C'est ce que la Libye paraît avoir oublié. Partir des faits, comme elle prétend le faire, se tenir aux faits sans les quitter jamais, cela s'appelle statuer *ex aequo et bono*. Des faits ne peut émerger le droit que si l'on applique à ces faits une norme juridique; les faits sont impuissants par eux-mêmes à créer du droit. Même des agissements purement matériels ne sont susceptibles d'entraîner une responsabilité sur la base du droit qu'en application d'une règle juridique préexistante prévoyant les conditions de mise en jeu et les effets de la responsabilité; sinon, c'est d'une décision en pure équité qu'il s'agit, et de rien d'autre.

Certes il importe, la Cour l'a indiqué à deux reprises, que la règle générale soit « adaptée à la diversité des circonstances de fait » (*Pêcheries, C.I.J. Recueil 1951*, p. 133; *Plateau continental de la mer du Nord, C.I.J. Recueil 1969*, p. 51, par. 94); et pour cela il faut, nous en sommes d'accord avec la Libye, examiner les faits, ouvrir la carte, observer les côtes et toutes les données géographiques et autres, prendre en compte la conduite des Parties. Mais cela ne veut pas dire que de ces faits bruts puisse jaillir, par un coup de baguette magique, une solution juridique, à la manière d'une Vénus sortant tout armée des flots.

Le droit de la délimitation du plateau continental ne saurait, selon nous, s'accommoder de la philosophie négatrice de tout principe exprimée par Talleyrand dans une formule célèbre : « Il n'y a pas de principes, il n'y a que des événements; il n'y a pas de lois, il n'y a que des circonstances. » Dans cette matière comme en toute autre, on est en présence, comme l'a observé un membre de la Cour en 1982, d'un

> « dilemme ... qui tient à la nécessité de respecter l'uniformité des principes et règles de droit dans une série de situations que caractérise leur extrême diversité » (*C.I.J. Recueil 1982*, opinion individuelle de M. Jiménez de Aréchaga, p. 106, par. 26).

Le droit de la délimitation du plateau continental exige certes que soit pris en considération l'*« unicum »* irréductible de chaque situation. Cela ne signifie pas pour autant que l'on puisse le concevoir comme formé d'une succession de solutions d'espèce, décidées au coup par coup et sans aucun fil directeur.

Les circonstances pertinentes ne sauraient donc, selon nous, suffire à déterminer la délimitation. Leur fonction ne peut être que de servir de réactif permettant de vérifier le caractère équitable (c'est-à-dire adapté aux données particulières du cas) d'une ligne reposant sur un élément objectif et général — pour tout dire: sur le droit; faute de quoi, la délimitation dériverait inéluctablement vers le subjectif et, du même coup, vers l'imprévisible.

Monsieur le Président, la démarche suggérée par la Libye dans sa réplique est de celles que peuvent suivre des gouvernements désireux de procéder à une délimitation conforme à des règles de droit, c'est-à-dire tenter d'aboutir à une solution identique à celle qui aurait pu être décidée par un juge ou un arbitre international. C'est ainsi que certains accords récents conclus par la France (la

Cour en trouvera des illustrations dans le compte rendu) font expressément référence au droit international (accords France/Tonga, **II**, CML, « Annex of Delimitation Agreements », accord n° 63; France/Maurice, *ibid.*, accord n° 65; France/Venezuela, *ibid.*, accord n° 67; France/Sainte-Lucie, *ibid.*, accord n° 69; France/Australie, *ibid.*, accord n° 71). Mais, s'ils le veulent, les gouvernements peuvent s'évader des considérations juridiques et retenir tout tracé leur paraissant équitable sur la base des seules circonstances de fait. L'équité se conçoit dans un tel cadre sous la forme la plus large. Elle peut reposer sur les considérations les plus diverses: économiques, militaires, que sais-je encore? Un gouvernement peut accepter une délimitation défavorable sur l'une de ses côtes en contrepartie d'une délimitation plus favorable sur une autre côte ou en contrepartie d'avantages économiques ou politiques d'ordre différent. Aucune règle de *jus cogens* ne vient restreindre leur liberté contractuelle à cet égard. Les faits peuvent constituer le point de départ de l'exercice de délimitation dans une délimitation conventionnelle.

Dans le cas d'une délimitation par voie judiciaire ou arbitrale la situation n'est plus la même, me semble-t-il. L'équité se conçoit alors d'une manière plus stricte que dans le cas d'une délimitation conventionnelle, car il s'agit d'une équité « within the rules », d'une « notion juridique de l'équité », comme l'a dit la Cour (*C.I.J. Recueil 1969*, p. 48, par. 88, et *C.I.J. Recueil 1982*, p. 60, par. 71). Contrairement à des gouvernements qui procèdent à une délimitation par voie d'accord, le juge ou l'arbitre ne peuvent pas adopter n'importe quelle délimitation qui leur paraîtrait équitable à partir du moment où ils ont ouvert la carte et examiné les faits. Ils ne peuvent pas se placer en marge du droit. Ils sont tenus, pour reprendre l'expression de la Chambre, « d'asseoir le résultat à atteindre sur une base de droit » (par. 59). On peut transposer ici ce que la Cour a déclaré dans un autre contexte:

> « Il ne s'agit pas seulement d'arriver à une solution équitable mais d'arriver à une solution équitable qui repose sur le droit applicable. » (*Compétence en matière de pêcheries, C.I.J. Recueil 1974*, p. 33, par. 78.)

C'est dire que la délimitation ne saurait flotter dans le vide. L'opération de délimitation ne peut pas se borner à extraire directement des faits une solution qui semblerait équitable. Elle doit nécessairement avoir un point d'ancrage dans le droit.

C'est dire aussi que la méthode de délimitation ne doit pas seulement être justifiée *ex post* par le caractère équitable du résultat, mais également *ex ante* par des considérations juridiques de caractère objectif. La séquence normale mène à la ligne de délimitation en partant du droit et de la géographie, et en passant par la méthode qui jette un pont entre eux. Commencer par tracer une ligne regardée comme équitable sur la base des seuls faits, c'est inverser l'ordre normal de l'opération de délimitation.

En refusant avec fermeté de concevoir sa mission comme l'« exercice d'un pouvoir discrétionnaire ou de la conciliation », la Cour a écarté toute approche de la délimitation du plateau continental qui, orientée exclusivement vers le résultat à atteindre, ne justifierait ce résultat que par rapport aux faits individuels et changeants de chaque espèce, sans l'ancrage sécurisant et stable du droit. Le droit ne saurait, selon la Cour, être cantonné dans le résultat à atteindre; il doit être présent également dans le processus qui l'y conduit. Limiter le droit à l'équité du résultat apprécié sur la base directe et exclusive des faits, et évacuer le droit des méthodes a appliquer, priverait la délimitation des espaces maritimes de toute sécurité, de toute prévisibilité. Si deux gouvernements décident de s'en remettre à la Cour internationale de Justice ou à l'arbitrage, ce n'est pas pour obtenir une espèce de conciliation obligatoire, mais pour être jugés à l'aune du droit. Toute confusion des genres risquerait de pousser les gouvernements à maximiser leurs revendications ou, plus grave encore, de les dissuader de recourir à la justice internationale. A un moment où il reste des centaines de délimitations maritimes à effectuer, un tel risque ne saurait être pris à la légère.

Monsieur le Président, le déroulement du processus de délimitation s'impose dès lors clairement de lui-même: une ligne de départ reposant sur une méthode enracinée dans le droit; puis une vérification du caractère équitable du résultat, avec les ajustements ou corrections nécessaires pour tenir compte des circonstances particulières à l'espèce. La ligne de délimitation d'arrivée ne coïncidera donc pas forcément avec la ligne provisoire de départ. Ainsi se trouvent respectés les deux pôles de toute délimitation selon le droit international. Car, me semble-t-il, pour être conforme au droit international, une délimitation doit satisfaire à deux conditions, l'une et l'autre nécessaires, sans qu'aucune d'elles ne soit suffisante: elle doit être ancrée dans le droit; elle doit être équitable compte tenu des circonstances particulières propres à l'espèce.

Ainsi que vient de le déclarer la Chambre dans l'affaire du *Golfe du Maine*:

> «il convient d'arrêter d'abord son choix sur une méthode pratique appropriée, à utiliser pour établir provisoirement une délimitation de base, puis de prendre en considération les correctifs que les circonstances spéciales de l'espèce pourront rendre indispensable de lui apporter. Il s'agira donc d'une opération en deux étapes.» (*C.I.J. Recueil 1984*, p. 333, par. 215.)

A une «délimitation provisoirement établie» (par. 185), déclare la Chambre, fait suite une délimitation établie «à titre définitif» (par. 216).

Notre conception de l'opération de délimitation, qui paraît ainsi être également celle de la Chambre, nous a valu des critiques cinglantes de la part de la Libye, qui nous accuse de minimiser le rôle des circonstances pertinentes et de chercher à nous évader des faits pour nous réfugier dans l'abstraction (ci-dessus, RL, p. 24, par. 3.14; p. 25, par. 3.17; p. 31, par. 3.34).

La Partie adverse, je le crains, a dû nous lire un peu rapidement. Ce que nous avons écrit, et que nous répétons, c'est que les circonstances pertinentes ne suffisent pas à elles seules à établir une ligne de délimitation (**II**, CMM, p. 60, par. 113); mais, loin de leur accorder un rôle subordonné, subsidiaire, nous avons tout au contraire souligné que leur prise en considération occupe une place capitale dans l'opération de délimitation (*ibid.*, p. 58, par. 108; p. 60, par. 112 et 114).

Il est à peine besoin d'ajouter qu'il n'y a pas de hiérarchie de primaire et de secondaire entre les deux aspects de la délimitation, et que l'un n'a pas prééminence sur l'autre. Ces deux aspects ne sont dissociables que pour les besoins de l'analyse et de l'exposé. Dans la réalité ils se confondent en une opération globale et synthétique dont l'objet est de prendre en considération à la fois et en même temps le fondement du titre — élément juridique commun à toutes les délimitations du plateau continental — et les circonstances pertinentes de l'espèce — élément particulier à chaque cas.

Le titre juridique au plateau continental, sans les faits concrets de l'espèce, serait un squelette sans chair; les faits de l'espèce, sans le titre juridique au plateau continental, seraient une chair sans ossature. La conception libyenne privilégie les faits à l'état nu et néglige le droit. La conception de Malte accorde leur juste place et au droit et aux faits.

Monsieur le Président, si les vues des Parties sur l'opération de délimitation divergent aussi profondément que je viens de l'exposer, c'est parce qu'elles se séparent sur un point précis: pour nous, le fondement juridique du titre de l'Etat côtier au plateau continental a nécessairement une incidence sur l'opération de délimitation; pour la Libye, au contraire, du moins dans la dernière version de ses écritures, titre juridique et délimitation évoluent sur des orbites différentes, et leurs routes ne se croisent pas.

C'est à ce problème précis des rapports entre le titre juridique au plateau continental et la délimitation, problème qui domine, à mon sens, l'ensemble de la controverse et qui en fournit la clé, que je voudrais m'arrêter à présent quelques instants.

### *3. Titre juridique et délimitation*

Si Malte acceptait de situer le fondement juridique du titre au plateau continental dans le prolongement naturel au sens géologique et géomorphologique du terme, la Libye, nous l'avons vu, serait toute disposée à admettre que le titre juridique intervient dans l'opération de délimitation (**I**, ML, p. 83, par. 6.09; cf. **II**, CML, p. 56, par. 2.84). Le problème, pour elle, serait réglé à son avantage, pense-t-elle. Mais Malte estime que c'est le principe de distance qui constitue le fondement juridique du titre de l'Etat côtier au plateau continental. Comme c'est ce principe que la Libye craint par-dessus tout, elle tente à la fois de jeter le doute sur le principe de distance en tant que base juridique du titre — c'est un aspect de la thèse libyenne que j'examinerai plus tard — et elle tente aussi d'ériger une barrière infranchissable entre titre juridique et délimitation. La Libye espère ainsi, au cas où elle ne pourrait empêcher la Cour de voir dans le principe de distance le fondement juridique du titre de l'Etat côtier au plateau continental, parvenir à tout le moins à préserver la délimitation de ce principe tant redouté.

Il n'est pas excessif de dire que la négation de toute corrélation entre titre et délimitation se situe au cœur du cas libyen. Aussi comprend-on l'insistance quasi obsédante avec laquelle ces thèses se trouvent répétées d'un bout à l'autre des trois écrits libyens (**I**, ML, p. 82, par. 6.04 et 6.06; p. 89-90, par. 6.22; **II**, CML, p. 80, par. 4.10; p. 81, par. 4.12; p. 101, par. 4.52; ci-dessus, RL, p. 3-4, par. 9; p. 18, par. 3.03; p. 19, par. 3.05; p. 21, par. 3.08; p. 22, par. 3.10; p. 23, par. 3.13; p. 31, par. 3.33; p. 33, par. 4.02; p. 72, par. 5.40).

Nous avons dénoncé les vices de ces thèses dans nos écritures (**II**, CMM, p. 54-56, par. 96-101; ci-dessus, RM, p. 29-32, par. 48-57). L'importance décisive du problème me conduit néanmoins à en reprendre ici quelques aspects.

Monsieur le Président, il est évident, et nous en sommes parfaitement d'accord, que les concepts de titre juridique — *entitlement* — et de délimitation ne sont pas synonymes et ne se recouvrent pas. La Libye nous fait un procès entièrement imaginaire en nous faisant continuellement grief de les confondre. Nous savons que le titre juridique intéresse la détermination des concepts sur la base desquels un Etat est juridiquement habilité à exercer une certaine juridiction sur les espaces maritimes au large de ses côtes; il se rapporte essentiellement à la fixation des limites extérieures, vers le large. Nous savons aussi que la délimitation, quant à elle, consiste à tracer une frontière entre des Etats voisins lorsque la situation géographique ne permet pas à chacun des Etats intéressés de jouir de son titre jusqu'à son extrême limite. Nous savons enfin que la Cour a fait clairement état de cette distinction entre titre et délimitation, tant dans son arrêt de 1969 (*C.I.J. Recueil 1969*, p. 22, par. 18 et 20; p. 32, par. 86), que dans son arrêt de 1982 (*C.I.J. Recueil 1982*, p. 47, par. 44; p. 61, par. 73).

Tout cela, nous le savons, de tout cela nous sommes d'accord. Le fait que les deux concepts soient distincts, et ils le sont, n'implique cependant pas qu'il ne puisse pas y avoir de corrélation entre eux. En concluant de la non-synonymie à la non-corrélation, le Libye se livre à un *non sequitur*.

Il nous paraît évident qu'une délimitation de plateau continental ne peut pas s'effectuer de la même manière selon que le titre juridique sur le plateau repose, mettons, sur l'occupation effective ou sur le prolongement naturel au sens physique du terme, ou sur une distance donnée des côtes ou sur quelque autre concept juridique. Une délimitation complètement détachée de la nature juridique du titre, et qui serait la même quel que soit le concept juridique du titre, serait étrangère à tout principe de droit; elle consisterait en une répartition du plateau reposant uniquement sur des considérations d'opportunité. C'est exactement à quoi conduit la thèse libyenne d'une délimitation axée seulement sur les faits, à l'exclusion de toute prise en considération du titre juridique: la délimitation qui «émerge» des faits, pour reprendre le mot de la Libye, serait exactement la même quel que soit le fondement des droits de l'Etat côtier au plateau continental, et quelle que soit l'évolution du droit coutumier en ce domaine. La thèse libyenne conduit en quelque sorte à isoler le droit de la délimitation du plateau continental et de son environnement juridique. Elle implique une sorte d'immobilisme juridique qui contraste avec l'évolution rapide et profonde du droit de la mer.

La position de la jurisprudence sur ce problème capital ne laisse pourtant place à aucune ambiguïté.

Si la Cour a fait, dans son arrêt de 1969, la place que l'on sait au prolongement naturel, c'est parce qu'elle avait auparavant situé la base juridique des droits de l'Etat côtier sur le plateau continental dans le prolongement naturel de son territoire sous la mer (*C.I.J. Recueil 1969*, p. 22, par. 19; p. 31, par. 43). Si le prolongement naturel n'avait pas été au cœur de l'*entitlement* dans l'arrêt de 1969, il n'aurait pas trouvé sa place au cœur de la délimitation.

Dans l'affaire franco-britannique, le tribunal arbitral a rejeté une méthode de délimitation de la région atlantique préconisée par la France, au motif que: «cette méthode ne semble pas au tribunal être compatible avec le régime juridique applicable au plateau continental...» (par. 246).

Mais c'est, bien entendu, dans l'arrêt *Tunisie/Libye* que le lien entre le titre et la délimitation a été mis en lumière de la manière la plus remarquable.

Je me permettrai de rappeler que, dans un *dictum* de principe, la Cour a d'abord déclaré que:

> «les «principes et règles du droit international qui peuvent être appliqués» pour la *délimitation* des zones du plateau continental découlent nécessairement de la *notion* même de plateau continental, telle qu'elle est comprise en droit international» (*C.I.J. Recueil 1982*, p. 43, par. 36). (Les italiques sont de moi.)

Après cela comment affirmer, comme le fait la Partie adverse, que titre et délimitation évoluent dans des mondes différents? Mais ce n'est pas tout. Un peu plus loin dans le même arrêt, la Cour aborde la question du paragraphe 1 de l'article 76 de ce qui n'était alors encore que le projet de convention sur le droit de la mer. Au paragraphe 48 de son arrêt, après avoir rappelé que désormais, «dans certaines circonstances, la distance à partir de la ligne de base, mesurée à la surface de la mer, fonde le *titre* de l'Etat côtier», elle indique que dans ce cas «seule la base juridique des droits sur le plateau continental — la simple distance de la côte — peut être prise en considération comme pouvant influer sur les prétentions des Parties», c'est-à-dire sur les prétentions dans le litige soumis à la Cour, autrement dit en matière de délimitation.

L'incidence du titre sur la délimitation apparaît dans une lumière tout aussi vive dans un troisième passage de l'arrêt de 1982 dont la Cour me permettra de donner lecture de nouveau:

> «C'est ... en partant de la côte des Parties qu'il faut rechercher jusqu'où les espaces sous-marins relevant de chacune d'elles s'étendent vers le large, ainsi que par rapport aux Etats qui leur sont limitrophes ou leur font face.» (*C.I.J. Recueil 1982*, p. 61, par. 74.)

La prise en considération des côtes — qui est une composante du concept de distance, mais qui est entièrement étrangère à celui de prolongement naturel physique — intervient donc, c'est clair, à la fois pour la fixation des limites extérieures et pour la délimitation.

Les prononcés de 1982 sont tellement dévastateurs pour le postulat libyen de l'incommunicabilité entre titre et délimitation que la Libye a tenté dans sa réplique une opération de dernière chance pour essayer d'en sauver quelque chose. Que nous dit la Libye?

D'abord, allègue-t-elle (ci-dessus, RL, p. 19, par. 3.05; cf. p. 22, par. 3.10), le paragraphe 1 de l'article 76 se réfère aux limites extérieures, et il ne peut avoir aucune incidence sur la délimitation pour une raison très simple. C'est que le même article comprend un paragraphe 10 qui dit:

> «Le présent article ne préjuge pas de la question de la délimitation du plateau continental entre des Etats dont les côtes sont adjacentes ou se font face.»

Puisque l'article 10 précise que rien dans le présent article ne préjuge de la question de la délimitation, cela signifie, explique la Libye, que le paragraphe 1 de l'article 76 ne peut pas être invoqué comme ayant un rapport quelconque avec la délimitation.

L'objection libyenne me paraît sans portée. Si la Cour a jugé utile d'évoquer l'article 76, paragraphe 1, dans l'affaire *Tunisie/Libye*, c'est précisément parce qu'elle estimait qu'il s'agissait là d'une disposition susceptible de «refléter des nouvelles tendances acceptées à prendre en considération en l'espèce» (*C.I.J. Recueil 1982*, p. 48, par. 47): «en l'espèce», c'est-à-dire dans la délimitation du plateau continental entre la Tunisie et la Libye. Pourquoi donc la Cour aurait-elle songé à évoquer ces dispositions si elle avait considéré qu'elles étaient dépourvues de toute pertinence pour l'affaire de délimitation dont elle était saisie? Que l'article 76, paragraphe 1, ait pour objet de définir les limites extérieures du plateau continental vers le large, cela est évident, certain, et nul ne le contestera. Mais la Cour n'a pas pensé qu'il y avait un obstacle à ce que cette disposition relative au titre ait une influence sur la délimitation. Elle a même pensé exactement le contraire. Elle a dit expressément que «cette définition ne doit pas être perdue de vue» *(cannot be ignored)*: «perdue de vue», pour quelle fin, si ce n'est celle de la délimitation du plateau continental en cause devant elle? Mieux encore, la Cour a déclaré qu'il ne fallait pas «perdre de vue» cette disposition aux fins de la délimitation, «bien que le paragraphe 10 spécifie que les dispositions de l'article ne préjugent pas de la question de la délimitation» (p. 48, par. 47). Aux yeux de la Cour, le paragraphe 10 de l'article 76 n'a donc pas fait obstacle à la pertinence du paragraphe 1 pour la délimitation. Je ne dis pas comme régissant la délimitation — car il régit la limite extérieure — mais comme pertinent pour l'opération de délimitation. Le premier argument libyen a donc déjà été rejeté par la Cour.

Second argument libyen: la Libye conteste qu'au paragraphe 48 de l'arrêt de 1982, que j'ai analysé il y a quelques instants, la Cour ait véritablement évoqué la délimitation; la Libye n'hésite pas à nous accuser d'avoir fait de ce passage une citation hors contexte et d'en avoir ainsi dénaturé le sens. C'est une accusation grave (ci-dessus, RL, p. 20, par. 3.06).

Monsieur le Président, le paragraphe 48 est connu de la Cour. Il parle pour lui-même. La Cour n'a-t-elle vraiment pas parlé de délimitation dans le paragraphe 48? La Cour parle dans ce passage de la distance en tant que fondement du titre de l'Etat côtier, et immédiatement après elle se demande comment cette nouvelle base juridique des droits sur le plateau continental qu'est la simple distance des côtes peut influer sur les prétentions des Parties (c'est-à-dire, je le répète, au sujet de la délimitation du plateau continental et non pas sur leur titre juridique ou les limites extérieures du plateau, qui étaient hors de cause dans l'affaire). La position de la Cour est simple: elle déclare qu'en l'affaire dont elle était saisie le principe de distance ne fournit aucun critère de délimitation, puisque les Parties ne s'étaient pas placées sur ce terrain. D'où, *a contrario*, que si les Parties s'étaient placées sur ce terrain, la nouvelle «base juridique des droits sur le plateau continental», à savoir «la simple distance des côtes», aurait pu «influer» — le mot *influer* est de la Cour — sur leurs prétentions.

Prétendre que le paragraphe 48 ne s'intéresse pas à la délimitation ne me paraît dès lors pas conforme au texte clair de ce passage de la Cour.

La Libye avance un troisième pion encore, aussi fragile que les précédents. Elle soutient, et elle a raison, que c'est l'article 83 de la convention qui régit la délimitation du plateau continental, et non pas l'article 76, paragraphe 1 (ci-dessus, RL, p. 22, par. 3.10). Mais, comme je l'ai dit tout à l'heure, le fait que l'article 76 ne régisse pas la délimitation ne signifie pas qu'il n'ait pas d'influence sur elle.

Pour faire justice de cet argument, il suffit d'observer que la Cour a évoqué elle-même l'article 83 immédiatement après avoir fait état de l'article 76 — les deux sont cités par la Cour au paragraphe 47 et au paragraphe 49 (*C.I.J. Recueil 1982*, p. 48, par. 47, et p. 49, par. 49-50). L'existence de l'article 83 n'a donc manifestement pas fait obstacle à ce que la Cour envisage de prendre également en considération, pour la délimitation, l'article 76. La pauvreté — voulue — de la règle énoncée à l'article 83 est telle, j'espère l'avoir montré, que cette disposition ne saurait constituer à elle seule le *corpus juris* des principes et règles du droit international régissant la délimitation du plateau continental. Le recours à l'article 76 pour compléter cette matière a dû paraître d'autant plus normal à la Cour que, pour elle, le titre juridique au plateau continental, objet propre de l'article 76, est pertinent par nature pour la délimitation.

Monsieur le Président, au terme de ces observations, l'existence d'une corrélation inhérente et nécessaire entre le titre juridique au plateau continental et la délimitation me paraît établie au-delà de tout doute. Ce qui signifie que, dans la mesure où le droit international coutumier place aujourd'hui, pour reprendre le langage de la Cour, le «titre de l'Etat côtier», c'est-à-dire la «base juridique des droits sur le plateau continental», dans «la simple distance de la côte» — toutes ces expressions sont de la Cour —, l'opération de délimitation du plateau continental entre Malte et la Libye ne peut pas être menée à bien en se basant uniquement sur les faits et sans que le «principe de distance» soit «pris en considération comme pouvant influer sur les prétentions des Parties». En un mot, le principe de distance *est* pertinent pour la délimitation.

De là une double conséquence.

— Négativement, la délimitation ne peut pas prendre pour point de départ le prolongement naturel au sens physique du terme. Même s'il était établi — et mon ami Elihu Lauterpacht a montré qu'il n'est pas établi — que scientifiquement la *Rift Zone* et la zone des escarpements marquent sur le plan physique la fin du prolongement naturel de Malte respectivement vers le sud et vers l'est, même alors l'opération de délimitation ne pourrait pas se limiter à s'appuyer servilement sur ces «faits physiques», étrangers au fondement juridique du titre de Malte et de la Libye au plateau continental.

— Positivement, la délimitation doit obligatoirement prendre comme point de départ une méthode en rapport avec le «titre de l'Etat côtier», c'est-à-dire avec le «principe de distance».

A la lumière de ces observations, il est possible à présent, Monsieur le Président, Messieurs les juges, de porter mon attention sur les deux concepts clés de la théorie juridique du plateau continental: le prolongement naturel et le principe de distance.

Tel sera l'objet des deux chapitres qui vont suivre.

## III. LE PROLONGEMENT NATUREL

J'aborde donc le concept de prolongement naturel, qui constitue l'alpha et l'oméga de la thèse libyenne.

Une remarque terminologique pour commencer.

Comme la Libye, nous prendrons le terme de prolongement naturel «dans son sens traditionnel de concept physique» (**I**, ML, p. 92, par. 6.28) — c'est ainsi qu'elle le définit —, c'est-à-dire dans la signification d'une caractéristique physique susceptible d'une identification scientifique.

Cela dit, le concept de prolongement naturel peut revêtir, même en s'en tenant à ses aspects physiques, des significations très différentes.

Dans l'affaire qui l'opposait à la Tunisie — la Cour s'en souviendra —, la Libye se fondait essentiellement sur la géologie historique des profondeurs et regardait la topographie sous-marine comme secondaire (voir les références dans **II**, CMM, p. 16, note 4); la Tunisie, au contraire, s'attachait essentiellement aux données géomorphologiques et bathymétriques.

Dans notre affaire, au contraire, tenant sans doute compte des indications de l'arrêt de 1982, la Libye a rectifié son tir et, même si les vieux démons de la géologie historique et de la tectonique des plaques refont surface de temps à autre, ce sont cette fois-ci essentiellement les données géomorphologiques et les données géologiques affectant la surface du lit de la mer qui, selon elle, caractérisent le prolongement naturel (voir les références dans **II**, CMM, p. 17, par. 33; *adde*, ci-dessus, RL, p. 59-75, par. 5.15-5.43; p. 76, par. 6.02).

Depuis son contre-mémoire, la Libye a cependant apporté une légère inflexion à cette manière de concevoir le prolongement naturel. La Libye regroupe à présent sous l'expression générique de «facteurs physiques» ou de «faits physiques» *(physical facts, physical factors)* une triade qu'elle définit comme comprenant non seulement la géomorphologie et la géologie, mais aussi la géographie (**II**, CML, p. 23, note 2; ci-dessus, RL, p. 54, note 1). Elle espère ainsi entraîner les facteurs non déterminants de la géomorphologie et la géologie derrière la locomotive des facteurs géographiques, seuls déterminants — j'aurai l'occasion d'y revenir.

Il est clair cependant — je dois le noter tout de suite — que cette nouvelle conception du prolongement naturel, constituée par le triple élément de la géographie, de la géologie et la géomorphologie, est totalement hétérogène. Les indications fournies par les caractéristiques géologiques et géomorphologiques des fonds marins ne vont pas forcément dans le même sens que ceux de la géographie côtière. Il n'y a aucune raison à priori pour que la prise en considération d'une séparation géologique ou géomorphologique du type de la soi-disant *Rift Zone* ou du type de la zone des escarpements reflète la configuration de la géographie côtière des deux pays. Les deux données se situent sur des plans tellement différents que la coïncidence relèverait du miracle — ou de l'argument d'avocat! C'est de manière tout à fait artificielle, cela saute aux yeux, que la Partie adverse tente ce regroupement contre nature sous le vocable global de «facteurs physiques».

Etant donné que la thèse libyenne de la *Rift Zone* et de la zone des escarpements ne s'appuie en aucune façon sur la géographie côtière — avec laquelle elle n'a rigoureusement aucun rapport —, mais uniquement sur les caractéristiques géologiques et géomorphologiques des fonds marins, c'est au prolongement naturel défini par ces dernières caractéristiques géologiques et géomorphologiques que je m'attacherai ici. Quant à la géographie côtière, qui est partie intégrante du principe de distance et de la méthode de l'équidistance, je me propose de l'évoquer dans les chapitres ultérieurs.

Monsieur le Président, mon ami Eli Lauterpacht a établi que la thèse libyenne est scientifiquement inexacte. On pourrait dire du plateau continental qui s'étend entre Malte et la Libye et des accidents de la soi-disant zone exactement ce que la chambre vient de dire du golfe du Maine et du chenal nord-est:

> «Bien sûr il est possible de discerner sur ce fond unique et uniforme ce qu'on appelle des plateaux, des bancs, des bassins, des chenaux... Il s'agit ... d'un ensemble finalement assez peu significatif d'inégalités de relief...
>
> Même le plus accentué de ces accidents ... ne possède pas les caractéristiques d'une véritable fosse qui marquerait la séparation entre deux unités géomorphologiques distinctes. Il y a là tout simplement un trait naturel de la région.» (*C.I.J. Recueil 1984*, p. 274, par. 45-46.)

Ce que je voudrais à présent démontrer, c'est qu'en tout état de cause — c'est-à-dire même si les descriptions factuelles de la Libye étaient scientifiquement exactes, ce qu'elles ne sont pas — les caractéristiques géologiques et géomorphologiques des fonds marins dont la Libye fait état ne seraient pas de nature à «indiquer», à «désigner» juridiquement une délimitation qui les transposerait du plan de la nature sur celui du droit.

*L'audience, suspendue à 11 h 20, est reprise à 11 h 30*

Monsieur le Président, l'impuissance des caractéristiques géologiques, géomorphologiques du lit de la mer et de son sous-sol à mettre en évidence une frontière de plateau continental résulte de la conjonction de deux considérations en interaction étroite, à savoir:

Premièrement, l'existence prétendue de deux plateaux continentaux physiquement séparés par une caractéristique naturelle du type de la soi-disant *Rift Zone* est incompatible avec le concept même de délimitation.

Deuxièmement, la prise en considération des caractéristiques géologiques et géomorphologiques des fonds marins comme élément déterminant dans la délimitation du plateau continental est condamnée par le principe de l'égalité des Etats.

Tels sont les deux aspects auxquels je voudrais m'attacher tour à tour.

### *1. L'existence prétendue de deux plateaux continentaux physiquement séparés par un accident naturel du type de la soi-disant Rift Zone est incompatible avec le concept même de délimitation du plateau continental*

Et d'abord l'incompatibilité de la thèse de la *Rift Zone* avec le concept même de délimitation du plateau continental.

Nous avons déjà fait remarquer que le concept libyen d'une délimitation «à l'intérieur de la *Rift Zone* et en suivant sa direction générale» est d'une imprécision telle que, si la Cour suivait les conclusions de la Libye, des dizaines de lignes frontières seraient possibles. Outre que, comme nous l'avons montré dans nos écritures (**II**, CMM, p. 23, par. 47), les limites orientale et occidentale de cette soi-disant zone sont mal définies, il ne faut pas oublier ce fait très simple que la *Rift Zone* telle que nous la dessinent les cartes libyennes (par exemple la ⑨ carte 17 du mémoire libyen, p. 160) couvre une étendue large de parfois plus de 100 kilomètres.

Mais là n'est pas le plus important, la Cour le constatera en se reportant à la ㊹ figure 13 de notre dossier[1], et je voudrais la prier respectueusement de bien vouloir se tourner un moment vers elle.

Dans la conception libyenne, c'est la soi-disant *Rift Zone* dans son ensemble, dans toute sa largeur et dans toute son ampleur, qui sépare le prolongement naturel de Malte, au nord, de celui de la Libye, au sud. Le prolongement naturel de Malte s'arrête à la lisière septentrionale et de la *Rift Zone*; le prolongement naturel de la Libye s'arrête à la lisière méridionale de la *Rift Zone*. Voilà ce que nous dit la Libye.

Si cette description était exacte, Monsieur le Président, eh bien, il n'y aurait tout simplement aucune possibilité de définir quelque ligne frontière que ce soit, et l'on devrait se contenter de prendre acte de la limite extérieure du plateau maltais et de la limite extérieure du plateau libyen! Il n'y aurait tout simplement plus lieu à délimitation puisque, par définition même, la délimitation implique la fixation d'une ligne séparant deux plateaux qui se touchent ou se chevauchent et que, dans l'une des conceptions libyennes au moins, les deux plateaux seraient séparés par un hiatus.

Dans son excellent ouvrage sur *The Legal Régime of Islands in International Law*, mon ami et collègue M. Bowett a fait justement observer qu'il ne peut se poser un problème de délimitation qu'entre des Etats qui bordent un même plateau continental. Si le plateau de chacun des Etats est détaché de celui de l'autre par une séparation physique, la seule chose qu'il y ait lieu de faire c'est de constater jusqu'où s'étend le prolongement naturel de chacun. Et comme il y a une séparation physique entre les deux, il n'y a plus de frontière commune entre les deux Etats:

> «Boundaries between shelves belonging to neighbouring States, be they opposite or adjacent, presuppose that the States share a common shelf, a shelf area likely to be of essential, physical continuity.» (*Op. cit.*, p. 221; cf. p. 144-145.)

Cette observation nous paraît parfaitement exacte.

La Libye ne se lasse pas de répéter que le plateau continental entre Malte et la Libye ne saurait être considéré comme un *continuum* (par exemple, **II**, CML, p. 44-45, par. 2.57; p. 45, par. 2.58; p. 47, par. 2.63; p. 49, par. 2.69; ci-dessus, RL, p. 28, note 4; p. 59, par. 5.15; p. 67, par. 5.29; p. 79, par. 5.38; p. 72, par. 5.40, etc.), puisqu'il est interrompu, selon elle, par la *fundamental discontinuity* que constitue la *Rift Zone*. Même dans ses conclusions finales, nous l'avons vu, la Libye confirme cette position. Cette conclusion est radicalement incompatible avec le concept de délimitation, qui fait l'objet du compromis par lequel l'affaire a été portée devant la Cour.

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[1] Les dossiers spécialement préparés à l'intention de la Cour par les Parties pour illustrer leurs plaidoiries ne sont pas reproduits. Si une carte ou illustration contenue dans un dossier est reprise dans le volume des cartes de la présente édition (**V**), elle est dûment signalée en marge du texte. *[Note du Greffe.]*

La Libye a-t-elle pris conscience du caractère autodestructeur de la thèse qui est la sienne d'une zone séparant les deux plateaux continentaux de Malte et de la Libye aux lieu et place d'une ligne les mettant en contact? Je ne sais. Toujours est-il que, sans modifier sa conclusion finale en faveur d'une frontière «within, and following the general direction of, the Rift Zone», elle a entrepris dans sa réplique d'esquisser un embryon de ligne, une espèce de «inchoate line», sous la forme de la soi-disant «Axial Ridge Line» (ci-dessus, ㉗㉚ RL, cartes 10 et 13) dont a parlé hier mon ami Elihu Lauterpacht.

㊹ La Cour trouvera cette ligne reproduite sur la figure 13 de notre dossier. Il s'agirait, la Cour s'en souvient, d'une ligne le long de laquelle la croûte terrestre aurait été amincie au maximum du fait des déchirements survenus en profondeur (ci-dessus, RL p. 65-66, par. 5.27; p. 83, par. 6.20; p. 84, par. 6.22). Le long de cette ligne, nous explique-t-on même, pourrait se produire un jour une séparation des plaques, créant ainsi un nouvel océan. Mais, ajoute prudemment la réplique, cette évolution n'est que «spéculative» (*ibid.*, p. 83, note 2). Nous voici en tout cas rassurés!

Monsieur le Président, même en faisant abstraction du caractère scientifiquement discutable — le mot est faible — de cette invention de dernière minute, dont le moins que l'on puisse dire est qu'on peut la soupçonner d'être quelque peu *pro domo sua*, comment ne pas constater une fois de plus la contradiction interne des thèses libyennes? Si la *Axial Ridge Line* existait, il n'y aurait plus de séparation des prolongements naturels le long des bords nord et sud de la *Rift Zone*. On ne saurait concevoir l'existence simultanée de deux sortes de limites des prolongements naturels entre Malte et la Libye: l'une qui serait formée de deux limites, qui suivraient respectivement, à une grande distance l'une de l'autre — des dizaines de kilomètres — les lisières nord et sud d'une zone dotée d'une certaine épaisseur; l'autre, de caractère linéaire, le long de la prétendue *Axial Ridge Line*. Dans le premier cas les prolongements naturels de Malte et de la Libye ne se toucheraient pas; dans le second ils se toucheraient le long d'une ligne. La thèse de la *Rift Zone* et celle de la *Axial Ridge Line* s'excluent mutuellement. Voilà la vérité, Monsieur le Président.

L'hétérogénéité s'aggrave encore lorsqu'on nous explique que — ô! miracle! — la ligne de plus grand amincissement court à peu près entre les deux séries de fosses et chenaux dont la Libye vient également de découvrir l'existence dans sa réplique de juillet dernier, l'une qui suivrait l'itinéraire de la fosse et du chenal de Malte au nord, l'autre qui suivrait l'itinéraire de la fosse de Linosa et du chenal de Medina au sud (ci-dessus, RL, p. 83, par. 6.21, et p. 84, par. 6.22). Ainsi donc ce n'est plus seulement la ligne du plus grand amincissement qui est mise en avant, mais une espèce de ligne médiane entre deux séries de profondeurs — c'est-à-dire une ligne de crêtes. Ce qui est d'ailleurs tout à fait
㊹ inexact: si la Cour veut bien jeter un coup d'œil sur la figure 13 de notre dos-
㉚ sier, qui reproduit la carte 13 de la réplique libyenne, elle constatera immédiatement que la soi-disant *Axial Ridge Line* ne passe pas du tout *entre* deux séries de fosses situées l'une au nord l'autre au sud, mais en plein milieu *dans* les fosses de Pantelleria et de Linosa.

La Libye nous parle d'une troisième ligne encore, celle qui unit les points terminaux sud des délimitations conventionnelles Italie/Tunisie et Italie/Grèce: une telle ligne, nous dit la Libye, ne s'écarterait pas substantiellement d'une ligne courant à travers la *Rift Zone* (ci-dessus, RL, p. 77, par. 6.05, et p. 84, par. 6.22). Cela fait beaucoup de lignes. La Libye n'a toutefois pas poussé cette idée jusqu'à l'illustrer en compagnie des deux autres: les deux autres figurent sur ces cartes,

pas celle-là. On comprend pourquoi. Si la Cour veut bien se reporter à nos
㊹㊳ figures 13 et 4 où les lignes de délimitation italo-tunisiennes et italo-grecques sont plus clairement reproduites, elle constatera que la ligne unissant les points terminaux sud de la délimitation conventionnelle Italie/Tunisie et de la délimitation conventionnelle Italie/Grèce n'a pas le moindre rapport avec la *Axial Ridge Line* ou avec la ligne qui court à mi-chemin entre les deux prétendues séries de fosses et de chenaux.

Les coïncidences miraculeuses ne s'arrêtent d'ailleurs pas là: la proposition libyenne de 1973, exclusivement fondée, cela a été dit par la Libye, sur la proportionnalité des longueurs côtières, cette proposition libyenne de 1973 est à son tour présentée comme proche de la ligne de plus grande minceur de la croûte terrestre et de la ligne de crête qui sépare les séries de plus grandes pro-
㉚ fondeurs (ci-dessus, RL, p. 84, par. 6.22, et carte 13). Que de coïncidences!

On se défend mal de l'impression que, sensible peut-être aux critiques maltaises, la Partie adverse a tenté l'impossible, mais vraiment l'impossible, pour évoquer une *ligne*, à la place d'une *zone* séparative de plusieurs dizaines de kilomètres d'épaisseur. Mais, ayant fait cela, la Libye n'a pas eu le courage, comme diraient les psychanalistes, de passer à l'acte. La ligne de délimitation en est demeurée à l'état de velléité, puisque les conclusions finales restent fidèles, je l'ai indiqué tout à l'heure, à la zone frontière — «a boundary within, and following the general direction of, the Rift Zone» — autrement dit à la non-frontière.

### *2. La prise en considération de caractéristiques géologiques et géomorphologiques des fonds marins comme élément déterminant dans la délimitation du plateau continental est condamnée par le principe de l'égalité des Etats*

J'en viens à présent, Monsieur le Président, à la seconde raison qui s'oppose à la prise en considération des données géologiques et géomorphologiques des fonds marins comme élément déterminant dans la délimitation du plateau continental: le droit international a écarté cette prise en considération parce qu'elle s'est avérée incompatible avec le principe de l'égalité des Etats.

L'égalité des Etats intervient en effet à un double niveau pour écarter une délimitation fondée sur les caractéristiques physiques des fonds marins et de leur sous-sol.

C'est l'égalité des Etats, d'abord, qui a constitué l'élément moteur de l'effacement du prolongement naturel et de l'émergence du principe de distance dans le droit du plateau continental. C'est l'égalité des Etats ensuite, qui est à la racine des principes de non-empiétement et de non-amputation dans la délimitation du plateau continental.

Je me propose d'examiner ces deux aspects l'un après l'autre.

### *L'évolution du droit international du prolongement naturel vers le principe de distance*

L'évolution du droit du plateau continental a été dominée par la préoccupation de réduire les inégalités entre Etats côtiers selon que la nature les a dotés d'un plateau continental plus ou moins large répondant au critère physique de prolongement naturel. Telle est la première constatation que l'on peut faire à cet égard.

Cette évolution, qui a commencé «très tôt», pour reprendre l'expression de la Cour — c'est-à-dire dès la convention de 1958 et ses travaux préparatoires à la

Commission du droit international — a été relatée par la Cour dans son arrêt de 1982 (*C.I.J. Recueil 1982*, p. 45-49, par. 41-50), ainsi que dans plusieurs opinions jointes à cet arrêt. Nous l'avons nous-mêmes retracée dans nos écritures (**II**, CMM, p. 63-74, par. 122-151; ci-dessus, RM, p. 36-41, par. 65-71). Le silence complet observé à ce sujet par la Libye dans sa réplique m'oblige à revenir ici sur certains aspects de cette évolution d'une importance capitale, au risque de rappeler des données connues de tous.

En 1953 déjà, l'attention de la Commission du droit international avait été attirée par certains de ses membres sur le cas des Etats qui, n'ayant pas de plateau continental au sens physique du terme, pouvaient être défavorisés par une conception exclusivement physique du plateau; et la suggestion avait été émise dès ce moment-là — il y a trente ans déjà! — de définir le plateau continental par une certaine distance de la côte, quelle que soit la profondeur (*Annuaire de la Commission du droit international*, 1953, vol. II, p. 9). Le concept de distance, la Cour voudra bien nous l'accorder, n'est ni une découverte récente ni le fruit de l'imagination de Malte!

C'est dès ce moment-là également que l'attention de la Commission avait été attirée sur le cas de fosses situées à proximité de la côte de certains Etats et qui risquaient de priver ces Etats de leurs droits sur des fonds marins peu profonds situés au-delà de ces fosses. La Commission avait estimé que de tels fonds, bien que séparés de la côte par une fosse, devaient faire partie du plateau continental de l'Etat riverain (*ibid.*, p. 214, par. 66).

C'est dès ce moment-là encore que le critère de profondeur a été complété par celui de l'exploitabilité, ce qui conférait au concept de plateau continental une potentialité d'extension à une distance de plus en plus grande vers le large au fur et à mesure des progrès de la technique. Par là était amorcé, comme la Cour le notera en 1982, «cet élargissement du concept [de plateau continental] à des fins juridiques» (*C.I.J. Recueil 1982*, p. 45, par. 41) qui n'a cessé depuis lors de caractériser l'évolution du droit du plateau continental.

On comprend dès lors que la Cour ait noté dès cette époque reculée une «absence d'identité entre la notion juridique de plateau continental et le phénomène physique que les géographes désignent par la même expression» (*C.I.J. Recueil 1982*, p. 46, par. 42; cf. opinion individuelle de M. Jiménez de Aréchaga, p. 112, par. 44), et que, tirant les conséquences de cette conception juridique sur le plan de la délimitation, elle n'ait pas «considéré comme synonymes une délimitation équitable et la fixation des limites des prolongements naturels» (*ibid.*, p. 46, par. 44).

Il ressort par ailleurs de l'arrêt de 1969 que la Cour n'a pas entendu remettre en cause les droits reconnus à la Norvège par les accords de délimitation qu'elle avait conclus avec d'autres Etats riverains de la mer du Nord et qui ne tenaient pas compte de l'existence de la fosse norvégienne (*C.I.J. Recueil 1969*, p. 32, par. 45).

Dès 1969, on le constate, le lien entre la délimitation et les faits physiques des fonds marins a commencé à se distendre.

La sentence arbitrale de 1977 marque une nouvelle étape dans cette évolution. Elle note que:

> «Le fait même qu'en droit international le plateau continental est un concept juridique signifie que son étendue et ses modalités d'application ne sont pas déterminées exclusivement par les facteurs physiques de la géographie mais aussi par les règles juridiques.» (Par. 191.)

De cette constatation sur le plan du *entitlement* le tribunal tire immédiatement la conséquence sur le plan de la délimitation: «on ne règle pas» toujours, dit le tribunal, la question de l'attribution d'une partie du plateau à l'un ou à l'autre des Etats intéressés «en se référant simplement au principe du prolongement naturel du territoire» (par. 192), et il faut faire appel aux «règles de droit qui forment le concept juridique de plateau continental» (par. 194).

Il n'est pas surprenant, dans ces conditions, que le tribunal arbitral ait écarté l'idée, que lui avait soumise le Royaume-Uni, de faire coïncider la ligne de délimitation avec la fosse centrale et la zone de failles de la fosse centrale. Les passages clés méritent d'être relus une fois encore:

> «Le Tribunal ne considère pas que la fosse centrale et la zone de failles de la fosse centrale soient des caractéristiques géographiques qui puissent avoir une influence réelle sur la détermination de la limite...
>
> ... il ne semble y avoir aucun motif juridique d'écarter la méthode de l'équidistance ou toute autre méthode de délimitation pour lui préférer simplement un accident tel que la fosse centrale ou la zone de failles de la fosse centrale...
>
> ... L'axe de la fosse centrale et de la zone de failles de la fosse centrale se trouve là où il est par un simple accident de la nature, et il n'y a en soi aucun motif pour que cet axe constitue la limite...» (Par. 107 et 108.)

Monsieur le Président, ne pourrait-on substituer les mots «Rift Zone» et «Escarpments-Fault Zone» à ceux de «fosse centrale et de zone de failles de la fosse centrale»?

C'est à juste titre, on le constate, que le professeur Bowett a relevé que le tribunal franco-britannique a trouvé le concept de prolongement naturel «de peu d'assistance» *(of little assistance)* (*op. cit.*, p. 168). Le profeseur Bowett voit là un «développement salutaire» *(a salutary development)*:

> «One of the more welcome features of the Court of Arbitration Award is that it has decreased, or corrected, the excessive emphasis of geological factors and emphasized rather more the geographical factors, in particular the coastal configuration of the Parties.» (*Op. cit.*, p. 221.)

Et le professeur Bowett précise que l'on peut considérer comme probable que dans l'avenir le «prolongement naturel se référera davantage aux configurations géographiques qu'aux facteurs géologiques». Le même point de vue se trouve exprimé dans l'article bien connu que le professeur Bowett a donné au *British Year Book of International Law* (1978, p. 16).

L'évolution ainsi déjà largement amorcée allait être accélérée considérablement par les travaux de la troisième conférence sur le droit de la mer. Pour corriger l'inégalité dont pâtissaient, sous l'empire de la conception antérieure, les Etats dotés par la nature d'un plateau étroit, on en vint à accorder à tout Etat côtier des droits de plateau continental sur le sol et le sous-sol des espaces maritimes adjacents à ses côtes jusqu'à une distance de 200 milles marins au moins de ces dernières, quelle que soit par ailleurs la configuration physique de ces fonds marins. La fixation d'une largeur uniforme de 200 milles pour tous les Etats côtiers aurait toutefois désavantagé les quelques Etats dont le plateau continental, au sens physique du terme, s'étend vers le large plus loin que 200 milles marins de leurs côtes. Pour éviter de faire perdre à ces quelques Etats l'avantage que leur assurait l'ancien critère des 200 mètres de profondeur, il fut décidé de leur conserver le bénéfice du critère du prolongement naturel jusqu'au rebord externe de la marge continentale. Cette extension n'était toutefois pas indéfinie: elle s'arrêterait, fut-il décidé, soit à une distance de 350 milles marins des lignes de base, soit à une distance de 100 milles marins de l'isobathe de 2500 mètres.

Monsieur le Président, l'égalité qui a été poursuivie — et obtenue grâce à ce compromis de la troisième conférence — n'implique évidemment pas que tous les Etats aient désormais un plateau continental: c'est une égalité qui a été établie entre les seuls Etats côtiers. Et encore ne s'agit-il pas d'accorder à tous les Etats côtiers des superficies égales de plateau continental; les zones de plateau continental relevant de chaque Etat côtier seront fonction de la configuration de ses côtes — chaque Etat côtier ayant une configuration différente aura donc une superficie différente de plateau continental. L'égalité qui a été recherchée à la troisième conférence a pour seul objet d'écarter les facteurs d'inégalité qui peuvent être provoqués par les caractéristiques des fonds marins telles que profondeurs plus ou moins grandes atteintes à des distances plus ou moins grandes de la côte, ou présence de fosses qui séparent la côte de zones peu profondes situées plus au large. C'est cette inégalité-là, et nulle autre, que l'on a écartée, et cela grâce à un critère spatial, qui opère indépendamment de toute caractéristique physique ou naturelle. C'est seulement au-delà de 200 milles marins que le prolongement naturel reprend une connotation physique; mais même là ce sont des critères d'ordre spatial qui fixent la limite extérieure des droits élargis de plateau continental.

La Libye reproche étrangement au critère de distance de conduire à ce qu'elle appelle une «theory of leap-frogging features of the sea-bed» (ci-dessus, RL, p. 97, par. 8.11). Mais oui, Monsieur le Président, c'est là très exactement la raison d'être du changement apporté par la troisième conférence à la conception du plateau continental et du recours à la distance pour définir les droits du plateau continental: le but recherché était effectivement de sauter par-dessus les inégalités provoquées par les caractéristiques des fonds marins!

C'est cette évolution-là qui a trouvé son expression dans l'article 76 de la convention sur le droit de la mer, auquel, comme je l'ai indiqué, s'attache aujourd'hui une valeur de droit coutumier.

La Cour a pris acte de ces données nouvelles du droit international dans son arrêt de 1982. Elle constate le divorce entre le concept de prolongement naturel physique et celui de plateau continental: «Le concept juridique, déclare la Cour, bien que fondé sur le phénomène physique, a évolué à part» (*C.I.J. Recueil 1982*, p. 46, par. 42). Avec l'article 76, observe la Cour, «la notion juridique du plateau continental reposant sur une «espèce de socle» est ... modifiée ou au moins complétée» par le critère de la distance de 200 milles, puisque ce critère «s'écarte du principe suivant lequel ce serait le prolongement naturel qui en constituerait la seule base» (*ibid.*, p. 48, par. 47-48). Ainsi, précise la Cour, se trouve menée à son terme l'évolution qui a conduit à inclure dans le plateau continental

> «toute étendue du fond des mers se trouvant dans un rapport particulier avec la côte d'un Etat voisin, *qu'elle présente ou non les caractéristiques exactes qu'un géographe attribuerait à un «plateau continental»* (*ibid.*, p. 45, par. 41). (Les italiques sont de moi.)

De cette évolution sur le plan du titre juridique la Cour tire une fois encore les conséquences sur le plan de la délimitation. La position prise par la Cour retient d'autant plus l'attention que, dans cette affaire *Tunisie/Libye*, les deux Parties s'étaient appuyées, l'une et l'autre, sur le prolongement naturel au sens physique du terme. La Cour déclare que, même si l'identification de la limite des prolongements naturels des deux Etats était scientifiquement possible (ce qui n'était pas le cas dans cette affaire), cette identification ne serait pas forcément

> «suffisante ni même appropriée en elle-même pour préciser l'étendue

> exacte des droits d'un Etat par rapport à ceux d'un Etat voisin» (*C.I.J. Recueil 1982*, p. 46, par. 43),

c'est-à-dire pour la délimitation, et elle déclaré qu'elle

> «ne peut ... faire sienne la thèse libyenne suivant laquelle, «une fois que l'on a déterminé le prolongement naturel d'un Etat, la délimitation ne consiste plus qu'à se conformer aux exigences de la nature» (*ibid.*, p. 47, par. 44).

Deux opinions jointes à l'arrêt jettent une vive lumière sur ce décrochage, par rapport au prolongement naturel physique, tant du concept juridique de plateau continental que du droit de la délimitation du plateau continental (*ibid.*, opinion individuelle de M. Jiménez de Aréchaga, p. 110, par. 39; p. 114, par. 51; p. 117, par. 59 et 61; p. 121, par. 73; opinion dissidente de M. Oda, p. 222, par. 107, et p. 257, par. 160).

Dans le droit fil de cette jurisprudence, l'arrêt de la Chambre dans l'affaire du *Golfe du Maine* observe ce qui suit:

> «le «titre juridique» sur certaines étendues maritimes ou sous-marines est toujours et uniquement l'effet d'une opération juridique. Il en va de même pour la limite jusqu'à laquelle ce titre s'étend. C'est d'une règle de droit que cette limite découle, et non d'une quelconque vertu intrinsèque que posséderait le fait purement physique.» (*C.I.J. Recueil 1984*, p. 296, par. 103.)

Ayant ainsi refusé de fonder le titre juridique de l'Etat côtier sur les faits physiques, la Chambre ne pouvait que refuser de considérer ces mêmes faits physiques comme un élément décisif pour la délimitation. C'est ce qu'elle a fait. Les Etats-Unis s'étaient appuyés massivement sur ce qu'ils appelaient la *natural boundary*, la «frontière naturelle» du chenal Nord-Est pour demander à la Chambre de tracer la frontière maritime unique le long de cet accident physique dans lequel ils voyaient la seule rupture significative *(the only significant break)* dans le plateau continental de la région (*C.I.J. Mémoires, Délimitation de la frontière maritime dans la région du golfe du Maine*, vol. II, mémoire des Etats-Unis, par. 13, 296; *ibid.*, vol. V, réplique des Etats-Unis, par. 213). La Chambre a écarté cette thèse avec une fermeté toute particulière. Elle a refusé de voir dans le chenal, comme je l'ai déjà indiqué, autre chose qu'un «trait naturel de la région» et a considéré ce «trait naturel» comme dépourvu de toute pertinence pour la délimitation. Elle a rappelé que

> «la présence d'accidents beaucoup plus accentués, tels que la fosse centrale et la zone de failles géologiques présentes dans le plateau qui faisait l'objet de l'arbitrage franco-britannique, n'a pas empêché le tribunal arbitral de conclure que les failles en question n'interrompaient pas la continuité géologique dudit plateau et ne constituaient pas [je me permets d'insister sur ce passage] des facteurs utiles pour arrêter la méthode de délimitation» (*C.I.J. Recueil 1984*, p. 274, par. 46).

Rarement, Monsieur le Président, Messieurs les juges, a-t-on été en présence d'une jurisprudence aussi concordante et aussi nettement affirmée.

Quant à la doctrine, elle a, de son côté, pris acte de cet effacement du critère du prolongement naturel, fondé sur les caractéristiques physiques des fonds marins, au profit du concept égalitaire et uniformisant de la distance mesurée à la surface de la mer.

La Partie adverse a fait état dans ses écritures (II, CML, p. 107, note 4) des travaux du colloque de la Société française pour le droit international, tenu à

Rouen, en 1983, sur le sujet suivant: «Perspectives du droit de la mer à l'issue de la troisième conférence des Nations Unies», et elle a reproduit deux pages extraites de la communication faite à ce colloque par M. Guillaume, directeur des affaires juridiques au ministère des relations extérieures français. Cette communication a été publiée *in extenso* il y a quelques mois dans le volume imprimé qui reproduit les rapports et discussions du colloque. Selon M. Guillaume, il n'existe que deux méthodes de délimitation acceptables, parce qu'elles respectent la nature, à savoir:

> «— soit prendre en compte les profondeurs, les structures géologiques, bathymétriques ou géomorphologiques du plateau continental, mais [c'est M. Guillaume qui parle] cette méhode ne vaut pas pour la zone économique et elle pose même problème au regard de la nouvelle définition du plateau continental donnée par l'article 76 de la convention des Nations Unies sur le droit de la mer, du moins jusqu'à une distance de 200 milles. Aussi le déclin du critère géologique, déjà amorcé dans la sentence arbitrale franco-britannique, est-il très perceptible à la lecture de l'arrêt de la Cour internationale de Justice de 1982;
>
> — soit [c'est toujours M. Guillaume qui parle], seconde solution, prendre en compte la surface, à partir de la géographie, donc de la configuration générale des côtes» (Paris, Pedone, 1984, p. 281).

Déclin du critère de la profondeur, fondé sur la géologie et la géomorphologie, au profit du critère de la surface, qui part de la géographie, donc de la configuration côtière: voilà résumée en quelques mots, de manière particulièrement frappante, l'évolution que j'ai retracée trop longuement.

En présentant, aujourd'hui, à la Cour une revendication centrée tout entière sur les données physiques des fonds marins, la Libye invite la Cour à un retour, non seulement au passé, mais à la préhistoire du plateau continental. Ce n'est plus seulement de l'immobilisme juridique; c'est du véritable passéisme.

La Libye était plus à jour, si j'ose dire, de l'évolution du droit international il y a quelques années, puisque dans l'affaire qui l'opposait à la Tunisie elle exposait que «le critère de profondeur ou bathymétrie a cessé d'avoir toute pertinence pour la définition du plateau en deçà de 200 milles de la ligne de base» (*C.I.J. Mémoires, Plateau continental (Tunisie/Jamahiriya arabe libyenne)*, vol. II, contre-mémoire libyen, par. 317). Or ici nous sommes, aussi bien pour la *Rift Zone* que pour la zone des escarpements, en deçà de 200 milles de la ligne de base.

Monsieur le Président, Messieurs les juges, l'enseignement à tirer de cet effacement du prolongement naturel physique dans le droit du plateau continental est clair: le droit international interdit de ramener la délimitation du plateau continental à l'identification d'une frontière naturelle sous-marine.

Si Malte était située en plein milieu de l'océan, loin de tout autre pays, ses droits de plateau continental ne seraient pas arrêtés par une configuration naturelle du type de la *Rift Zone* située à une quinzaine de milles marins de ses côtes; ils sauteraient, si j'ose dire, par-dessus elle et s'étendraient au moins jusqu'à 200 milles vers le large. Ce n'est pas parce que Malte est située à proche distance de la Libye que ses droits de plateau continental devraient soudainement être arrêtés par une telle configuration sous le prétexte que celle-ci constituerait une frontière naturelle entre les fonds marins des deux pays.

Mon ami Elihu Lauterpacht a rappelé que les accidents de la soi-disant *Rift Zone*, comme ceux de la zone des escarpements, ne marquent pas le rebord externe de la marge continentale de Malte et n'arrêtent donc pas ses droits de plateau continental. En serait-il même autrement, à supposer même que la marge continentale de Malte s'arrête à la *Rift Zone* et à la zone des escarpements les droits de plateau continental de Malte ne seraient quand même pas bloqués par ces accidents, puisqu'ils s'étendraient, en vertu de la règle de droit coutumier dont j'ai retracé l'évolution et qui est exprimée aujourd'hui à l'article 76, jusqu'à 200 milles de ses lignes de base.

Je voudrais exprimer cette constatation élémentaire sous une autre forme. De deux choses, l'une: ou bien les accidents physiques de la soi-disant *Rift Zone* et de la zone des escarpements ne marquent pas physiquement le rebord externe de la marge continentale de Malte — ce qui est le cas —, ou bien ils le marquent. Dans le premier cas, les droits de plateau continental de Malte s'étendent au-delà, jusqu'au rebord externe de la marge continentale. Dans le second cas, ces accidents étant situés à moins de 200 milles marins des lignes de base de Malte, les droits du plateau continental de Malte s'étendent ici encore au-delà de ces accidents, jusqu'à 200 milles marins des lignes de base.

En un mot, comme en cent, le concept de frontière naturelle n'a aucune place dans le débat compte tenu de l'évolution du droit international en cette matière.

La Partie adverse se défend, il est vrai, dans sa réplique, d'avoir jamais soutenu que la *Rift Zone* constitue *per se* une frontière maritime naturelle (ci-dessus, RL, p. 7, par. 1.04; p. 82, par. 6.19; p. 94, par. 8.03). Elle n'emploie pas le mot, c'est exact, mais c'est pourtant bien de cela qu'il s'agit, puisque la Cour est invitée à placer la délimitation exactement là où la nature a, à en croire la Libye, situé la séparation physique entre les prolongements physiques respectifs des deux pays. Lorsque la nature désigne le cours d'une frontière, lorsqu'on évoque une frontière «physiquement identifiée» (I, ML, p. 234, par. 9.02), cela, je le répète porte un nom: cela s'appelle une frontière naturelle.

Monsieur le Président, Messieurs les juges, le concept même d'une frontière que le droit emprunterait à la nature est étranger au droit international de la mer. Il serait inconcevable que les frontières de plateau continental séparant des Etats dont les côtes se font face ou sont adjacentes se situent obligatoirement là où les hasards de la nature ont placé des accidents topographiques ou géologiques sous-marins. L'égalité des Etats, car c'est d'elle qu'il s'agit, serait gravement compromise si la nature pouvait imposer aux gouvernements et aux tribunaux internationaux des frontières génératrices d'empiétements. A quoi s'ajoute que, en admettant même que les «exigences de la nature» *(the dictates of nature)*, pour reprendre l'expression que la Libye avait utilisée dans son litige avec la Tunisie (*C.I.J. Mémoires, Plateau continental (Tunisie/Jamahiriya arabe libyenne)*, vol. I, p. 487, par. 89), puissent dicter le droit, l'identification du «trait naturel» à ériger en frontière n'irait pas toujours de soi. La nature ne parle pas toujours d'une voix parfaitement claire. Dans le cas présent, par exemple, pourquoi les accidents de la prétendue *Rift Zone* s'imposeraient-ils avec plus de force contraignante à la Cour que les accidents similaires situés plus au sud, tels que la fosse de Jarrafa ou la vallée (ou sillon) tripolitain dont a parlé hier mon ami Elihu Lauterpacht? Ces accidents, il n'est pas sans intérêt de le noter — la fosse de Jarrafa et le sillon tripolitain — sont mentionnés en
⑪ toutes lettres sur la carte bathymétrique internationale de la Méditerranée sur laquelle la Partie adverse déclare s'appuyer dès le début de son mémoire (I, ML, p. 26, par. 3.03), qu'elle a analysée dans l'annexe technique de son mémoire et dont elle a placé une copie réduite dans la pochette du volume III de son mémoire. Le nom de ces deux accidents a toutefois disparu sur toutes les cartes des écrits libyens destinées à représenter le «General Morphological Setting», tandis que les noms des fosses et chenaux de la soi-disant *Rift Zone* y sont soigneusement reproduits. La Cour pourra s'en convaincre si elle veut bien
② se reporter à la carte 6 du mémoire libyen, à la carte 4 du contre-mémoire

㉘㉙㉚ libyen, aux cartes 1, 11, 12 et 13 de la réplique libyenne. Dans la même perspective, pourquoi les accidents en creux de la prétendue *Rift Zone* s'imposeraient-ils avec plus de force contraignante à la Cour que la ligne de crêtes formée par les bancs de Medina et de Melita qui se rapprochent du niveau de la mer, à 146 et 86 mètres de profondeur à peine?

La Libye fait valoir, je ne l'ignore pas, que l'«élément de hasard» que nous avons avancé à propos des accidents géologiques et géomorphologiques affecte l'ensemble des facteurs géographiques de chaque situation concrète, et pas seulement les accidents sous-marins (ci-dessus, RL, p. 29, par. 3.29). Pourquoi, semble dire la Libye, la délimitation devrait-elle s'incliner devant la nature — comme nous le prétendons du côté maltais — lorsqu'il s'agit de la géographie, mais ne devrait-elle pas s'incliner devant la nature lorsqu'il s'agit de la géologie ou de la géomorphologie sous-marines?

La question est intéressante; la réponse me semble-t-il est claire.

Il aurait certes été possible de concevoir les droits maritimes des Etats du monde comme dominés par le principe d'une répartition totalement et strictement égalitaires: les Etats sans littoral auraient joui de droits identiques à ceux des Etats côtiers, et les Etats côtiers auraient eu tous les mêmes superficies maritimes indépendamment de la configuration de leurs côtes. Cela aurait été concevable, mais ce n'est pas cette conception que le droit international a consacrée. La philosophie du droit international a été différente. Les droits maritimes sont réservés aux Etats côtiers à peu d'exceptions près — M. Quéneudec a très justement mis l'accent sur ce qu'il appelle l'«aspect militant ... de la doctrine du «côtiérisme» (*op. cit.*, p. 132) — et les droits de chaque Etat côtier sont fonction de sa géographie côtière.

«Il est ... nécessaire de regarder de près la configuration géographique des côtes des pays dont on doit délimiter le plateau continental», déclare la Cour dans l'affaire du *Plateau continental de la mer du Nord* (*C.I.J. Recueil 1969*, p. 51, par. 96). «La méthode de délimitation à adopter doit être en rapport avec les côtes des Parties qui bordent effectivement le plateau continental», répète la sentence franco-britannique (par. 240). «C'est ... en partant de la côte des Parties qu'il faut rechercher jusqu'où les espaces sous-marins relevant de chacune d'elles s'étendent ... par rapport aux Etats qui leur sont limitrophes ou leur font face», confirme la Cour en 1982 (*C.I.J. Recueil 1982*, p. 61, par. 74). «Une ligne de délimitation à tracer dans une aire déterminée est fonction de la configuration des côtes», proclame la Chambre dans l'affaire du *Golfe du Maine* (par. 205).

En un mot comme en cent, la «nature» qu'il faut respecter, la nature qu'il ne faut pas «refashion», c'est la géographie côtière. Ce n'est pas la structure géologique ou la topographie des fonds marins et de leur sous-sol. La frontière qu'indique la géographie de surface, celle des côtes, oui. La frontière que désignent la géologie et la géomorphologie des profondeurs, celle des fonds marins, non.

La pratique des Etats a-t-elle montré plus d'enthousiasme que la jurisprudence pour les frontières naturelles sous-marines? Certainement pas. L'observation en a été faite par le tribunal franco-britannique dès 1977 (sentence arbitrale, par. 107), et elle demeure valable aujourd'hui. Nous avons examiné la totalité des accords de délimitation qui figurent dans l'annexe produite par la Libye, et nous avons constaté que des fosses et dépressions parfois très importantes ont été ignorées complètement par les gouvernements intéressés. Des exemples ont été cités par mon ami M. Mizzi, parmi lesquels une place particulière doit être faite à deux accords intéressant des zones proches de la nôtre, à savoir les accords de délimitation entre l'Italie et la Tunisie et entre l'Italie et la

Grèce (cf. **II**, CMM, p. 70-74, par. 144-151; ci-dessus, RM, p. 39-41, par. 70-71).

A cette pratique massivement contraire à la frontière naturelle sous-marine, et dans les détails de laquelle je crois tout à fait inutile d'entrer ici, une exception, probablement la seule: la fameuse fosse de Timor. L'agent de Malte a fourni à ce sujet des explications détaillées. Et nous en avons également parlé dans nos écritures. Nous avons cru pouvoir écrire à ce sujet que le fait que deux Etats peuvent délimiter leur plateau continental selon un accident de la nature du type de la fosse de Timor — ils le peuvent certainement — ne signifie pas qu'une juridiction internationale soit obligée en droit d'adopter une délimitation fondée sur un tel critère (**II**, CMM, p. 68, par. 137, et p. 71, par. 145). Cette observation nous paraissait exprimer une vérité évidente. Elle a pourtant suscité l'ironie cinglante de la Partie adverse qui n'hésite pas à nous accuser de «casuistique» (ci-dessus, RL, p. 29, par. 3.28). Pour justifier notre point de vue, je me permettrai de rappeler que, selon un membre de la Cour, les facteurs physiques et géologiques ne figurent pas

> «parmi les règles juridiques qui régissent ou déterminent la délimitation ... mais parmi les facteurs que les Parties [peuvent] prendre en considération en négociant la délimitation qui les intéresse» (*C.I.J. Recueil 1982*, opinion individuelle de M. Jiménez de Aréchaga, p. 117, par. 60).

Et l'auteur de cette opinion d'ajouter que, entre la délimitation conventionnelle et la délimitation judiciaire ou arbitrale, «la différence est énorme» (*there is a world of difference*). En droit, c'est-à-dire pour le juge ou l'arbitre, écrit-il:

> «Les caractéristiques physiques — dépressions, chenaux, contours du fond des mers, structures géologiques, etc. — ne sauraient suffire à déterminer les limites du plateau continental.» (*Ibid.*, par. 61.)

En un mot: que deux Etats négocient la délimitation de leur plateau continental en tenant compte d'une fosse, dépression, chenal ou canyon est une chose — et encore ne le font-ils quasiment jamais. Que le juge ou l'arbitre leur imposent une telle délimitation au nom du droit en est une autre. Voilà, Monsieur le Président, pour la «casuistique».

Dans son plus récent écrit, la Partie adverse semble avoir changé son fusil d'épaule en ce qui concerne les enseignements à tirer de la pratique des Etats en matière de configurations sous-marines. Au lieu de soutenir, comme elle l'avait fait dans son mémoire et dans les commentaires de son annexe sur les accords de délimitation, que les données physiques du sol et du sous-sol ont joué un rôle important dans les délimitations conventionnelles — car c'est cela qu'elle soutenait à ce stade-là — elle reconnaît à présent que tel n'est pas le cas; mais elle ajoute immédiatement que les accords n'expriment pas toujours clairement les raisons de la délimitation retenue et que l'on ne saurait donc en tirer des conclusions précises (ci-dessus, RL, p. 30, par. 3.30). Nous en sommes d'accord, mais alors pourquoi — je me permets de poser la question — pourquoi la Libye a-t-elle jugé bon d'assortir certains des commentaires de son annexe sur les accords de délimitation de la mention que la frontière adoptée suit tel ou tel accident sous-marin? Commentaires aventureux de son propre aveu, d'autant plus aventureux d'ailleurs que dans un des cas au moins cette interprétation est formellement contredite par le texte même de l'accord qui déclare la délimitation fondée sur l'équidistance (accord Cuba/Mexique, annexe 47; cf. ci-dessus, RM, p. 41, par. 71).

Mais il y a mieux encore. Cherchant à faire contre mauvaise fortune bon cœur, la Libye explique à présent que l'absence de précédents dans la pratique conventionnelle elle-même ne fait que mettre en relief le caractère hautement spécial et exceptionnel de notre affaire et l'originalité particulièrement marquée de la *Rift Zone* (**II**, RL, p. 30, par. 3.30-3.31). Si j'ai bien compris cet argument, la *Rift Zone* constituerait l'accident sous-marin le plus significatif du monde. Des autres fosses ou dépressions qui existent sur le globe, les Etats ont légitimement pu faire abstraction, tellement elles sont insignifiantes; de la soi-disant *Rift Zone* — celle qui mérite les majuscules — la Cour ne saurait faire abstraction, tant elle est remarquable. La Cour appréciera la valeur de l'argument...

Monsieur le Président, de même que la dangereuse doctrine des «frontières naturelles», que Rousseau a condamnée en faisant observer «qu'elles aboutissaient à faire de l'ordre politique l'ouvrage de la nature», a été écartée par le droit international en matière de frontières terrestres, ainsi que l'a noté un membre de la Cour en 1982 (*C.I.J. Recueil 1982*, opinion individuelle de M. Jiménez de Aréchaga, p. 117, par. 61), de même le droit international de la mer n'accepte pas que les frontières de plateau continental soient «l'ouvrage de la nature». Comme vient de le déclarer la Chambre:

> «une délimitation, qu'elle soit maritime ou terrestre, est une opération juridico-politique et ... rien ne dit que, là même où une frontière naturelle apparaît, la délimitation doive nécessairement en suivre le tracé.» (*C.I.J. Recueil 1984*, p. 277, par. 56.)

Comme les frontières terrestres, les frontières maritimes sont le fruit de la volonté politique des Etats ou de la décision juridique du juge international; et ni les gouvernements ni le juge international ne bornent l'exercice de leur pouvoir à un constat scientifique. *Res judicata pro veritate habetur*, dit-on depuis des siècles. C'est à la *veritas* juridique que ce vieil adage se réfère, et non pas à la *veritas* scientifique. La mission de la Cour est celle d'un organe judiciaire chargé de dire le droit; elle n'est pas, contrairement au rôle que voudrait lui faire jouer la Partie adverse, celle d'un collège scientifique qui viendrait, à la manière d'un expert ou d'un superexpert, conférer une force de vérité légale à un prononcé de caractère scientifique.

Une dernière observation encore si vous me le permettez au sujet des frontières naturelles sous-marines.

Si l'on avait pu à la rigueur accepter de tenir compte des accidents physiques sous-marins à une époque où le plateau continental n'intéressait que l'exploration et l'exploitation des richesses des fonds marins, il en va différemment aujourd'hui. A présent les limites extérieures et les frontières du plateau continental coïncideront dans bien des cas avec celles de la zone économique exclusive. Comment imaginer que des limites extérieures et des frontières entre Etats voisins intéressant la colonne d'eau puissent être dictées aux gouvernements et à fortiori au juge international par les caractéristiques physiques du lit de la mer et du sous-sol telles qu'une fosse ou une dépression?

Inconcevable en elle-même, une solution de ce genre ne ferait qu'étendre aux eaux surjacentes l'impact des hasards naturels auxquels on a précisément cherché à porter remède à la troisième conférence sur le plateau continental, en aggravant leur effet inégalitaire par l'adjonction d'un coefficient multiplicateur.

Monsieur le Président, Messieurs les juges, «le plateau continental est une institution du droit international qui, bien que restant liée à un fait naturel, ne s'identifie pas au phénomène désigné par la même expression dans d'autres disciplines»; il n'y a pas «identité entre la notion juridique de plateau continental et le phénomène physique que les géographes désignent par la même expression»; «le concept juridique, bien que fondé sur le phénomène physique, a évolué à part»; «la notion de prolongement naturel est et demeure une notion à examiner dans le contexte du droit coutumier et de la pratique des Etats» (*C.I.J. Recueil 1982*, p. 45-46, par. 42-43): par ces prononcés clairs et décisifs la Cour a pris position, me semble-t-il, sur plusieurs des points qui se trouvent aujourd'hui en discussion devant elle. La tentative de la Partie adverse de les remettre en question dans notre affaire est ma seule excuse — et je prie la Cour de bien vouloir l'accepter — pour avoir si longuement repris le thème, à vrai dire tout à fait banal, de l'érosion des critères physiques au profit de critères juridiques dans le droit de la délimitation du plateau continental.

L'égalité des Etats n'a pas seulement constitué le moteur de l'effacement du prolongement naturel physique au profit du principe de distance. Elle se traduit également sous la forme d'un principe capital en matière de délimitation du plateau continental: celui de non-empiétement.

C'est à ce second aspect du rôle du principe d'égalité des Etats en cette matière que je voudrais m'attacher à présent.

*Egalité des Etats et principe de non-empiétement*

Par définition, un problème de délimitation surgit seulement lorsqu'il n'existe pas d'espaces maritimes suffisants pour que chacun des Etats puisse se projeter jusqu'à l'extrême limite de ses droits et que chacun des deux Etats doit donc accepter un sacrifice. L'amputation est inhérente au concept de délimitation. Mais encore faut-il que cette amputation soit équilibrée et raisonnable et qu'elle ne privilégie pas de manière inéquitable l'une des côtes au détriment de l'autre, en accordant, par exemple, un effet déraisonnable à une configuration mineure de l'une des côtes au détriment de l'autre. C'est cela, me semble-t-il, que signifie très exactement le principe de non-amputation ou de non-empiétement.

Cette exigence fondamentale de l'équité, une délimitation qui reposerait sur les facteurs physiques de la géologie ou de la géomorphologie n'a aucune raison logique d'y satisfaire autrement que par l'effet de hasard heureux ou d'une coïncidence due à la chance. Une caractéristique sous-marine, fût-elle même d'une grande ampleur, est située là où elle est par un «accident de la nature» (*a fact of nature*), selon l'expression du tribunal franco-britannique; elle constitue un «trait naturel de la région», selon l'expression de la Chambre. Mais, Monsieur le Président, la nature peut mal faire les choses. Si l'«accident de la nature» se situe très près des côtes de l'un des Etats, et très loin des côtes de l'autre, cette caractéristique physique ne pourrait être retenue comme indicative d'une frontière de plateau continental qu'au prix d'une amputation déséquilibrée, donc inéquitable, des droits de l'un des Etats. Il suffit, par exemple, d'évoquer la fosse du cap Breton près de la côte espagnole, ou la fosse norvégienne près de la côte norvégienne, ou le sillon tripolitain près de la côte libyenne. Chaque fois que la prise en considération d'une caractéristique des profondeurs conduirait à placer la frontière du plateau continental à une trop grande proximité de la côte de l'une des parties, amputant ainsi la projection maritime de cette dernière de manière déséquilibrée, une atteinte grave serait portée à l'un des éléments constitutifs de la conception même du plateau continental, à savoir le droit inhérent, *ipso facto* et *ab initio*, de chaque Etat côtier à l'extension maritime engendrée par ses côtes.

La Libye n'ignore rien de ces opérations. Le fait de ne pas avoir tenu compte de la fosse norvégienne dans la délimitation entre le Royaume-Uni et la Norvège lui paraît tout à fait justifié:

> «otherwise [écrit-elle, si on en avait tenu compte], the United Kingdom

> would have acquired a grossly disproportionate share of the continental shelf of the North Sea between the two States if the boundary line had followed the Norwegian Trough which runs close to the Norwegian Coast.» (**I**, ML, p. 101, par. 6.51.)

Pourquoi ce qui est valable pour la fosse norvégienne entre la Norvège et le Royaume-Uni cesserait-il de l'être pour la soi-disant *Rift Zone* entre Malte et la Libye? Y aurait-il donc deux vérités?

Et si la nature avait eu l'idée de placer la *Rift Zone*, ou même une dépression beaucoup plus marquée — quelque sillon tripolitain multiplié par dix, par exemple — à quelques milles marins seulement de la côte libyenne, la Libye accepterait-elle que ses droits de plateau continental s'arrêtent à cette dépression et que de l'autre côté de cette fosse, vers le nord, le plateau continental tout entier appartienne à Malte, ou à d'autres Etats? Encore une fois, y aurait-il donc deux vérités?

Dans l'affaire *Tunisie/Libye*, la Libye s'était montrée très attentive à ce problème. Elle avait fait valoir que le principe du non-empiétement trouve sa raison d'être dans le souci de chaque Etat côtier de ne pas voir une puissance étrangère exercer des droits d'exploration et d'exploitation des fonds marins directement devant ses côtes, et elle évoquait à cet égard des «considérations de sécurité et de praticabilité» *(considerations of security and practicability) (C.I.J. Mémoires, Plateau continental (Tunisie/Jamahiriya arabe libyenne)*, vol. IV, réplique libyenne, p. 59, par. 130, cité dans **II**, CMM, p. 12, par. 21).

La Libye aurait-elle oublié ce qu'elle exposait avec tant de force — et tant d'exactitude — hier?

Si la limite extérieure du plateau continental a été repoussée vers le large jusqu'à une distance d'au moins 200 milles marins, c'est essentiellement, comme je l'ai rappelé, afin de ne pas établir une inégalité entre les Etats côtiers selon le caprice des configurations naturelles; mais c'est aussi pour une autre raison, c'est pour mettre chaque Etat à l'abri de l'exploration et de l'exploitation des ressources de ses fonds marins à une trop grande proximité de ses côtes (cf. *C.I.J. Recueil 1982*, opinion individuelle de M. Jiménez de Aréchaga, p. 119-120, par. 70). C'est pour cette raison également que le droit international ne tient compte aujourd'hui, pour fixer les limites extérieures du plateau continental vers le large, ni d'une chute du fond marin vers les profondeurs en deçà d'une distance de 200 milles marins, c'est-à-dire à une brève distance des côtes, ni de la présence d'une fosse ou dépression en deçà de cette même distance. Dès lors que les droits de plateau continental de l'Etat côtier s'étendront au moins jusqu'à une distance de 200 milles marins, l'Etat côtier sera assuré qu'aucun Etat tiers ne pourra venir explorer ou exploiter les ressources du sol et de son sous-sol à une si brève distance de ses côtes.

Le principe du non-empiétement ne fait que transposer et exprimer cette préoccupation majeure sur le plan de la délimitation entre Etats voisins. Il s'agit, bien sûr, d'assurer à chacun des Etats un espace suffisamment large pour lui permettre l'exploration et l'exploitation des ressources naturelles des fonds marins, mais il s'agit aussi de veiller à ce que l'un des deux Etats ne puisse pas procéder à l'exploration ou à l'exploitation des ressources des fonds marins à une distance trop rapprochée des côtes de l'autre Etat.

Préoccupation économique au premier chef, sans nul doute. Mais comment nier que des considérations politiques au sens large du terme, des préoccupations de souveraineté en quelque sorte, se profilent en filigrane derrière les préoccupations purement économiques? La Libye s'insurge lorsque Malte fait état de telles considérations. Je me permettrai de rappeler ce que disait ici à cette même place, il y a quelques mois à peine, l'agent des Etats-Unis dans sa déclaration finale dans l'affaire du *Golfe du Maine*:

> «[The] issue of cut-off . . . raises the most fundamental questions of sovereignty. The question of cut-off posed in this case, not only in a geographic sense, but in a political sense as well, affects the interests of all States. For all our hopes that the customary law of coastal-State rights will now stabilize, no State knows with any certainty what the future of the economic zone régime will hold.» (*C.I.J. Mémoires*, vol. VII, p. 266.)

Le souci de garder l'autre Etat suffisamment éloigné de sa propre côte se situe ainsi au cœur même du principe du non-empiétement. Le lien est éclatant entre ce principe et le concept de distance.

Il n'est pas douteux, nul ne le contestera, que la violation du principe de non-empiétement, expression particulière du principe général de l'égalité des Etats, conduit à écarter dans certains cas la méthode de l'équidistance. Cela est acquis. Et pourquoi alors la violation du principe de non-empiétement ne condamnerait-elle pas également, pour les mêmes raisons, une délimitation fondée sur les données géologiques et géomorphologiques des fonds marins? Le déséquilibre dans les amputations infligées aux projections respectives des deux Parties ne saurait être critiquable dans le cas où il serait imputable à l'application de la méthode de l'équidistance, et devenir acceptable dans le cas où il serait dû à la prise en considération des caractéristiques physiques des profondeurs sous-marines.

Par sa nature même, je le répète, le principe du non-empiétement a un caractère essentiellement spatial. Il complète et corrobore le déclin du prolongement naturel, ainsi que l'émergence parallèle du concept de distance, en vue d'assurer le respect de l'égalité des Etats dans le droit de la délimitation du plateau continental.

Pleinement consciente, je l'ai noté, de cet aspect du problème lorsqu'il s'agit de la fosse norvégienne ou de ses propres droits de plateau continental, la Libye y devient insensible lorsqu'il s'agit des droits de Malte. Qu'une délimitation fondée sur les prétendus faits physiques de la *Rift Zone* et de la zone des escarpements conduise à empiéter massivement sur la projection maritime de Malte et à amputer massivement cette projection ne semble pas gêner la Libye. Comment ne pas être frappé pourtant par l'effet d'enclave rapprochée que provoquerait une frontière de plateau continental conforme aux vœux de la Libye, c'est-à-dire une frontière qui passerait à quelque 15 milles marins seulement des côtes maltaises vers le sud et qui bloquerait la projection maritime de Malte à quelque 60 milles marins des côtes maltaises vers l'est? Une frontière de ce genre passerait juste sous les fenêtres de Malte, si j'ose dire, lui faisant perdre le contrôle d'espaces sous-marins directement adjacents à ses côtes, alors que l'extension maritime de la Libye s'épanouirait largement. Rarement un Etat aura-t-il formulé une revendication aussi déraisonnable et inéquitable, et ce n'est pas parce qu'elle se fonderait sur les facteurs physiques de la géologie et de la géomorphologie sous-marines qu'elle deviendrait plus acceptable. Un ㊹ coup d'œil sur l'une quelconque des cartes libyennes ou sur la figure 13 de notre dossier en dit plus long là-dessus que toutes mes explications.

J'ai prononcé le mot d'enclave. Au début de la procédure, le Libye hésitait quelque peu, semble-t-il, à parler d'enclave, même si l'idée en était incontestablement présente, ainsi que nous l'avons immédiatement relevé dans notre contre-mémoire (**II,** CMM, p. 13, par. 23). Les deux derniers écrits libyens font preuve de moins de réserve à ce sujet.

Le contre-mémoire libyen évoque discrètement l'enclavement de deux îles yougoslaves dans l'accord italo-yougoslave, l'enclavement partiel des îles italiennes dans l'accord italo-tunisien, et l'enclavement partiel de certaines îles dans les accords relatifs au Golfe (**II**, CML, p. 129, par. 5.77; p. 130, par. 5.79; p. 133, par. 5.91) — comme si l'on pouvait assimiler le cas de Malte, Etat souverain, à celui d'îles appartenant à l'un des deux Etats continentaux voisins!

Dans sa réplique la Libye revient à l'idée d'enclavement en évoquant à deux reprises l'enclavement des îles Anglo-Normandes par la sentence arbitrale franco-britannique de 1977 (ci-dessus, RL, p. 47, par. 4.42, et p. 80, note 1). La Libye aurait-elle oublié que l'un des motifs invoqués en faveur de cette solution par le tribunal arbitral a précisément été que ces îles doivent être considérées «comme des îles du Royaume-Uni, et non pas comme des Etats semi-indépendants jouissant d'un titre particulier à leur plateau continental vis-à-vis de la République française» (sentence arbitrale, par. 186)? Contrairement aux îles Anglo-Normandes, Malte est un Etat indépendant qui jouit à coup sûr d'un titre particulier à son plateau continental vis-à-vis de la Libye. En outre, comme le relève également le tribunal arbitral franco-britannique, les îles Anglo-Normandes ont cette particularité d'être situées «du côté français de la ligne médiane tracée entre les territoires terrestres des deux Etats», c'est-à-dire «du mauvais côté de la ligne médiane» (*ibid.*, par. 183 et 199): ce trait, mis en avant à juste titre par le professeur Bowett dans l'ouvrage que j'ai cité (p. 203), ne s'applique sûrement pas à Malte.

Mais c'est dans un autre passage de la réplique que la Libye lève complètement le masque au sujet de ses intentions d'enclavement de Malte:

> «The fact that Malta is a group of small islands necessarily leads to another result that seems to have eluded Malta — it is bound ultimately to be enclaved, whatever means of delimitation are agreed between Malta and its neighbours.» (Ci-dessus, RL, p. 57, par. 5.10.)

Si la Libye veut dire par là que le plateau continental de Malte connaîtra fatalement, faute d'espace suffisant en Méditerranée, certaines limites dans toutes les directions, elle ne fait qu'énoncer sous une forme élégante une vérité d'évidence. Cette vérité s'applique à vrai dire tout autant à la Libye, car, bien que n'étant pas une île et bien que n'étant pas petite, la Libye doit elle aussi accepter une réduction de ses projections maritimes vis-à-vis de Malte. Mais si la Libye laisse entendre par là que les droits de Malte doivent être réduits en raison de sa double nature d'Etat insulaire et d'Etat de faible superficie, et non pas en raison du manque d'espace en Méditerranée, elle formule une proposition juridiquement inacceptable. La Libye ne proclamerait alors, en substance, rien de moins que le principe de la soustraction des petits Etats et des Etats insulaires — et à plus forte raison des Etats qui ont le malheur d'être à la fois petits et insulaires — à la garantie que leur apporte le principe du non-empiétement, expression du principe fondamental de l'égalité des Etats.

Exagération, caricature, nous objectera la Partie adverse. Certes, mais si peu! Combien de fois ne nous a-t-on pas expliqué que dans cette Méditerranée si étroite, si serrée, si confinée, le Lilliput maltais doit modérer ses appétits face à ceux du Gulliver libyen et se contenter de la portion congrue tandis que la part du lion reviendrait à la Libye (par exemple, **I**, ML, p. 136, par. 9.07; p. 155, par. 10.05)! La réplique libyenne s'indigne et s'énerve de ce que nous ayons présenté la thèse libyenne sous la forme raccourcie de *Malta disregarded*; et elle ajoute que la Libye comparaît devant la Cour «sur un pied d'égalité avec Malte» et qu'«il n'y a aucun problème quant à l'existence de Malte» *(there is no issue as to the existence of Malta)* (ci-dessus, RL, p. 1-2, par. 3). C'est vrai, la thèse libyenne du prolongement naturel, ne prive pas Malte de tout droit à un plateau continental. Mais comment ne pas voir que ces thèses n'accordent pas à Malte, mais alors pas du tout, le traitement équitable que réclame le principe de non-amputation? Peut-on considérer comme raisonnable une frontière de plateau continental qui passerait, je le répète, à certains endroits à une quinzaine de milles marins de Malte — c'est-à-dire à 3 milles marins seulement de la limite extérieure de sa mer territoriale — alors qu'elle passerait à plus de 150 milles marins de la Libye? La réponse est claire.

Le caractère excessif, déraisonnable, inéquitable de la revendication libyenne apparaît dans une lumière particulièrement vive lorsque l'on prend conscience de ce que la Libye réclame, vis-à-vis de Malte, une frontière de plateau continental se situant plus au nord — et donc plus favorable à la Libye — que la ligne médiane tracée entre la Libye et l'Italie en faisant abstraction de l'existence de Malte. Même avec *Malta disregarded* la Libye ne pourrait espérer pousser aussi loin vers le nord ses droits de plateau continental! J'ai tracé approximativement sur la carte derrière moi les contours de la *Rift Zone*, donc du *claim* libyen, la ligne médiane entre l'Italie et la Libye ne donnant pas d'effet à Malte, et la ligne médiane entre Malte et la Libye revendiquée par Malte. Pour la commodité de la Cour et de la Partie adverse, nous nous proposons de reproduire ces indications sur notre carte de base et de l'ajouter à notre dossier dès que possible. Ces cartes montrent, en tout cas, je le rappelle, que la Libye revendique, vis-à-vis de Malte, une ligne qui est située plus au nord que la ligne médiane entre l'Italie et la Libye, faisant abstraction de l'existence de Malte. Nous sommes donc même au-delà de *Malta disregarded*.

Monsieur le Président, Messieurs les juges, le moment est venu de conclure ces développements sur le prolongement naturel.

Si vous le permettez, je le ferai en ramenant à quelques phrases les conclusions qui me semblent s'imposer:

1) Les droits de l'Etat côtier sur les fonds marins et leur sous-sol ne sont plus liés aujourd'hui aux caractéristiques géologiques et géomorphologiques (sauf le cas de marges continentales se prolongeant au-delà de 200 milles des lignes de base). Ces droits s'étendent à une distance de 200 milles des lignes de base quelles que soient la structure géologique, la configuration ou la topographie des fonds marins: une chute rapide vers les profondeurs ne les arrête pas; une fosse ou une dépression, quelle que soit son importance, ne les interrompt pas.

2) Cette règle du droit international coutumier, qui a trouvé expression dans l'article 76, paragraphe 1, de la convention sur le droit de la mer de 1982, a pour objet essentiel d'assurer l'égalité entre les Etats côtiers indépendamment des caractéristiques géologiques et géomorphologiques des fonds marins et de leur sous-sol adjacents à leurs côtes. Positivement, cette règle assure à tous les Etats côtiers le droit d'exploration et d'exploitation des fonds marins et de leur sous-sol jusqu'à une distance minimale de 200 milles de leurs lignes de base. Négativement, elle interdit aux Etats tiers d'exercer de tels droits à une distance inférieure à 200 milles des lignes de base d'un Etat côtier quelconque.

3) L'étendue des droits de plateau continental de chaque Etat côtier dépend essentiellement de la configuration de ses côtes, c'est-à-dire de facteurs géographiques. Le principe demeure que la terre domine la mer et que le plateau continental constitue l'extension de la souveraineté territoriale sous la mer.

4) La nature du titre juridique de l'Etat côtier sur le plateau continental a des incidences directes sur la délimitation du plateau continental entre Etats voisins dont les côtes sont adjacentes ou se font face.

5) Pas plus que la fixation des limites extérieures, la délimitation du plateau

continental ne peut dépendre des hasards des caractéristiques géologiques et géomorphologiques des fonds marins et de leur sous-sol. Comme la fixation des limites extérieures, la délimitation du plateau continental dépend essentiellement de la géographie côtière et repose sur la prise en considération d'une certaine distance par rapport aux côtes.

6) Faire dépendre la délimitation du plateau continental des hasards de caractéristiques géologiques et géomorphologiques des fonds marins et de leur sous-sol conduirait à des empiétements et des amputations générateurs d'inéquité. Le principe du non-empiétement est de nature essentiellement spatiale: il tend à assurer à chacun des deux Etats voisins un espace raisonnable — en termes de distance des côtes — sur lequel il puisse exercer ses droits souverains et dont il puisse écarter l'autre Etat. Seule la prise en considération de la géographie côtière et du facteur de distance par rapport aux côtes permet de satisfaire à cette exigence.

7) La délimitation du plateau continental ne peut donc pas prendre pour point de départ, en tant que titre juridique du plateau continental, les données géologiques et géomorphologiques du sol et du sous-sol, ni accorder d'une autre manière à ces données un rôle prééminent dans la délimitation.

8) En conséquence, la thèse libyenne construite tout entière, comme elle l'est, sur les caractéristiques géologiques et géomorphologiques des fonds marins, se révèle — indépendamment même des inexactitudes factuelles sur lesquelles elle s'appuie — comme contraire au droit international. La soi-disant *Rift Zone* et la zone des escarpements sont dénuées de tout caractère déterminant dans la délimitation du plateau continental entre Malte et la Libye. Ces configurations des profondeurs sous-marines ne reflètent en aucune manière la configuration de la géographie côtière des deux pays, et leur prise en considération aux fins de la fixation de la frontière de plateau continental entre Malte et la Libye conduirait, en raison de leur situation, à une violation grossière du principe de non-empiétement et, par là même, à une violation du principe de l'égalité des Etats.

Monsieur le Président, si la revendication libyenne se trouve condamnée parce qu'elle est fondée sur une conception erronée du prolongement naturel et sur une méconnaissance du principe de distance, la revendication maltaise est, quant à elle, conforme au droit international puisque, sans faire référence aux structures géologiques et géomorphologiques sous-marines, elle repose sur le principe de distance.

C'est donc vers ce principe que je me propose, avec votre autorisation, de me tourner demain matin.

*L'audience est levée à 13 heures*

## TREIZIÈME AUDIENCE PUBLIQUE (30 XI 84, 10 h)

*Présents*: [Voir audience du 26 XI 84.]

M. WEIL: Monsieur le Président, Messieurs les juges, après avoir examiné dans mes précédents développements les sources du droit applicable, l'opération de délimitation et le prolongement naturel, je me tourne à présent vers le principe de distance.

### IV. LE PRINCIPE DE DISTANCE

L'expression «principe de distance», que j'emprunte à la Cour (*C.I.J. Recueil 1982*, p. 49, par. 48) se réfère essentiellement à un élément spatial, à savoir une certaine distance exprimée numériquement.

C'est cette distance qui permet de déterminer jusqu'où s'étendent, aussi bien vers le large que par rapport aux Etats voisins, les droits et juridictions maritimes de l'Etat côtier, et en particulier ses droits de plateau continental.

Le principe selon lequel la terre domine la mer, et selon lequel les droits et juridictions de l'Etat côtier sur les espaces maritimes adjacents à ses côtes sont l'extension et l'accessoire de la souveraineté territoriale, trouvait naguère son expression, en ce qui concerne le plateau continental, dans le concept de prolongement naturel. Il la trouve aujourd'hui dans le principe de distance qui lui confère un contenu concret et aisément déterminable.

Le principe de distance constitue dès lors la traduction moderne de l'idée fondamentale d'adjacence sur laquelle l'arrêt de la Chambre dans l'affaire du *Golfe du Maine* vient d'attirer l'attention (*C.I.J. Recueil 1984*, p. 296, par. 103).

Mais une distance ne se définit pas dans l'absolu, elle se mesure par rapport à quelque chose, en l'espèce par rapport aux côtes. Le principe de distance comporte donc, outre l'élément spatial, une seconde composante: la notion de côtes. C'est la liaison entre ces deux paramètres: côtes et distance, qui forme le principe de distance.

Le rapport entre la géographie côtière et l'élément spatial a été mis en lumière dans l'arrêt de 1982. Il faut relire une fois de plus les formules de la Cour, tant elles sont riches de substance:

> «Le lien géographique entre la côte et les zones immergées qui se trouvent devant elle est le fondement du titre juridique de cet Etat...» (*Plateau continental (Tunisie/Jamahiriya arabe libyenne), arrêt, C.I.J. Recueil 1982*, p. 61, par. 73.)
>
> «Dans la mesure ... où ... dans certaines circonstances la distance à partir de la ligne de base, mesurée à la surface de la mer, fonde le titre de l'Etat côtier ... seule la base juridique des droits sur le plateau continental — la simple distance de la côte — peut être prise en considération comme pouvant influer sur les prétentions des Parties.» (*Ibid.*, p. 48, par. 48.)

De l'avis de Malte, c'est dans le principe de distance, conçu comme un rapport entre les côtes et la distance, que réside le titre juridique qui doit nécessairement être pris en considération comme point de départ du processus de délimitation.

Aussi voudrais-je me pencher tour à tour sur chacune de ces deux composantes.

Et d'abord, les «côtes».

### *1. Les «côtes»*

Il serait tout à fait inutile de revenir sur l'importance primordiale du concept de côtes, proclamée par une jurisprudence unanime et reconnue par la Libye, si la Partie adverse ne s'était livrée à une succession de glissements injustifiables et d'assimilations arbitraires qui la conduise, tout en proclamant son attachement à la primauté de la géographie côtière, à en dénaturer le sens.

J'ai déjà eu l'occasion de dénoncer la tentative adverse de mettre sur le même plan, sous le couvert du vocable générique de «facteurs physiques», la géographie côtière, d'une part, la géologie et la géomorphologie, d'autre part.

Sans doute la Libye espère-t-elle, grâce à cet amalgame de concepts hétérogènes, faire bénéficier les faits non pertinents de la géologie et de la géomorphologie sous-marines du pavillon juridique flatteur de la géographie côtière. Il faut le répéter une fois encore, une frontière dictée par les accidents sous-marins de la soi-disant *Rift Zone* et de la zone des escarpements ne serait en aucune manière le fruit ou même le reflet de la géographie des côtes de Malte et de la Libye.

Ainsi apparaît un premier aspect d'une tentative de vaste envergure tendant à ne proclamer l'importance des côtes que pour exorciser ce problème et mieux s'en débarrasser.

Un second aspect de cette tactique consiste à glisser subrepticement du concept de «côtes» à celui de «masse territoriale derrière les côtes» *(landmass behind the coasts)*. Nous avions déjà relevé ce glissement dans les deux premiers mémoires libyens (voir ci-dessus, RM, p. 42, par. 76). Il s'est confirmé avec éclat dans la réplique libyenne, où l'on peut lire, entre autres, ceci:

> « What determines the appropriate method of delimitation is the relationship of the two landmasses and the two coasts . . . the shelf area is "generated" by the respective landmasses and coasts . . . » (Ci-dessus, RL, p. 45, par. 4.36.)

Ou encore ceci:

> «good sense would require that an equitable delimitation should reflect the landmass behind the coast in terms of the "weight" of its natural prolongation» (*ibid.*, p. 88, par. 7.10).

On retrouve ainsi le thème qu'un Etat de dimensions considérables comme la Libye jouit d'un prolongement naturel plus «intense» et plus «naturel» — ce sont les mots employés par les écritures libyennes — qu'un petit Etat comme Malte (**II**, CML, p. 41, par. 2.48).

Nous avons dénoncé dans nos écritures cette tentative inadmissible de se servir de la primauté des côtes pour faire venir sur le devant de la scène les superficies respectives des territoires des deux Etats (ci-dessus, RM, p. 43-46, par. 77-82) qui sont derrière les côtes. M. Mizzi a déjà évoqué cette question et M. Brownlie y reviendra plus en détail.

Je me bornerai pour ma part à une seule observation: la thèse libyenne porte une fois de plus atteinte à l'égalité des Etats. L'idée, cent fois exprimée tout au long des écrits libyens, que, dans le processus de délimitation, l'énorme *«landmass»* libyenne doit peser plus lourd que la *«small size»* de Malte (par exemple, ci-dessus, RL, p. 91, par. 7.16) fait intervenir un facteur de discrimination qui est aux antipodes du droit international.

Aucun accord de délimitation conclu à ce jour ne vient confirmer la thèse selon laquelle un Etat côtier bénéficerait d'un surplus de «poids» du fait de l'étendue de son *hinterland* terrestre, pas plus qu'elle ne confirme cette autre thèse qu'un Etat côtier devrait accepter une *capitis deminutio* du fait que son *hinterland* terrestre est un peu profond. Les côtes, certainement oui; l'étendue des terres qui se trouvent derrière les côtes, certainement non.

L'idée que la masse terrestre se projetterait en mer en sautant en quelque sorte par-dessus les côtes est juridiquement inacceptable. Elle l'est aussi politiquement, car elle tend à remettre en cause et à ébranler les fondements mêmes du droit de la mer.

Non, Monsieur le Président, les côtes libyennes n'ont pas plus d'«intensité» pour engendrer les droits du plateau continental ni plus de «poids» pour fixer une délimitation que les côtes maltaises. La dimension de l'Etat, la dimension terrestre de l'Etat est tout simplement en dehors de la question.

Non contente d'affecter aux côtes des Parties un pouvoir générateur de plateau continental plus ou moins intense en fonction de la dimension du territoire terrestre qui en constitue le *hinterland*, la Libye introduit entre les côtes maltaises et les côtes libyennes une nouvelle discrimination, en fonction cette fois-ci du caractère insulaire ou continental du territoire des deux Etats. Ce qui signifierait, à en croire la Libye, que le pouvoir générateur du plateau continental des côtes maltaises se trouverait mutilé du fait d'une double infirmité: la dimension réduite de Malte, d'une part, son caractère insulaire, de l'autre.

La thèse libyenne d'une gradation dans le pouvoir générateur des côtes défie le bon sens. Il est évident — j'y reviendrai — qu'un Etat insulaire de petite taille, s'il est situé au milieu de l'océan, engendre des droits de plateau continental jusqu'à 200 milles marins au moins de ses côtes: son pouvoir générateur d'espaces maritimes vers le large n'est donc pas mutilé du fait de son insularité ou de sa petitesse. Si Malte était située à plus de 400 milles — ou même exactement à 400 milles marins de la Libye — Malte engendrerait une ceinture de 200 milles marins au moins de plateau continental tout autour de ses côtes, bien qu'elle soit une île, bien qu'elle soit petite. Et malgré sa dimension considérable et malgré son caractère continental la Libye serait exactement dans la même situation. Bref, Malte et la Libye auraient un pouvoir générateur du plateau continental égal, et la Libye ne pourrait pas contester à Malte le droit d'avoir les mêmes projections qu'elle-même.

Pourquoi cette égalité dans l'intensité du pouvoir générateur de droits de plateau continental disparaîtrait-elle comme par enchantement lorsque, comme c'est le cas, Malte et la Libye sont trop proches l'une de l'autre pour que leurs droits puissent s'exercer vers le large dans leur intégralité? Et pourquoi Malte aurait-elle soudain un pouvoir générateur de plateau continental moins intense que la Libye? On retrouve ainsi, par une autre voie, les observations que j'ai faites précédemment au sujet de la relation entre le principe de non-empiétement et celui de l'égalité des Etats.

Pour tenter de faire admettre une thèse aussi inattendue, la Libye nous explique que dans la pratique des Etats et dans la jurisprudence la question des petites îles a toujours soulevé des difficultés, qu'elles ont été ignorées, enclavées ou dotées d'un effet réduit (ci-dessus, RL, p. 38, par. 4.12; p. 80, note 1; p. 88, par. 7.10). En un mot, nous dit-on «the size of the island will virtually always be a relevant factor in the delimitation» (*ibid.*, p. 88, par. 7.10).

Sans doute la Libye reconnaît-elle — comment pourrait-elle nier une évidence juridique aussi éclatante? — que, conformément à la règle coutumière exprimée dans l'article 121 de la convention sur le droit de la mer, les îles doivent être traitées comme tout autre territoire terrestre (I, ML, p. 111, par. 6.82;

cf. p. 110, par. 6.79). Mais ce qu'elle déduit de là, c'est la proposition surprenante que les îles — ou les Etats insulaires — ne bénéficient pas d'un statut privilégié par rapport aux autres territoires (**I**, ML, p. 142, par. 9.22; **II**, CML, p. 33, par. 2.31; p. 73, par. 3.36; p. 78, par. 4.01; p. 93-98, par. 4.34-4.45). Car Malte est accusée, tout au long des écrits libyens, de soutenir qu'un petit pays insulaire doit bénéficier de règles juridiques plus favorables qu'un Etat continental de dimension plus grande. L'accusation est tellement ridicule, la dénaturation de notre position est tellement grossière que ne ne sais quoi répondre. Ce que nous soutenons, c'est que Malte, bien que petite et bien qu'insulaire, jouit de droits égaux à ceux de tout autre Etat côtier. Malte réclame le droit à l'égalité. La Libye traduit: «Malte réclame un privilège.»

Monsieur le Président, l'argumentation libyenne est dominée tout entière par une confusion, qui la dévore de l'intérieur, à la manière d'un ver dans un fruit. Je veux parler, la Cour l'aura deviné, de la confusion systématiquement entretenue entre deux situations essentiellement différentes: celle des îles qui sont rattachées politiquement à un Etat continental, et celle des îles qui forment par elles-mêmes des entités étatiques souveraines.

Lorsqu'il s'agit d'îles dépendantes, c'est vrai, le droit international leur attribue un effet variable dans la délimitation du plateau continental, et il tient compte à cet égard, c'est vrai, de leur dimension, ainsi d'ailleurs que de leur population, de leur économie et de leur situation à proximité ou non de la côte de l'un des Etats, du «bon» ou du «mauvais» côté de la ligne médiane.

On fait souvent référence à ce sujet à une intervention du Commander Kennedy, représentant du Royaume-Uni devant la quatrième commission de la conférence de Genève, le 9 avril 1958. Après avoir indiqué qu'«au nombre des circonstances spéciales dont il pourrait y avoir lieu de tenir compte on peut mentionner l'existence d'une île, petite ou grande, dans la zone à répartir», le Commander Kennedy suggérait que «pour tracer une ligne de démarcation, on tienne compte de l'étendue des îles» (*islands should be treated on their merits*, selon le texte original). Il a suggéré aussi que l'on néglige de «très petites îles» situées sur le plateau continental continu et en dehors de la mer territoriale (*Première conférence des Nations Unies sur le droit de la mer, Documents officiels*, vol. VI, p. 112; texte anglais, p. 93). Monsieur le Président, il s'agissait manifestement, dans l'esprit de M. Kennedy, de petites îles appartenant à l'un des Etats et se trouvant dans la zone à délimiter.

Depuis lors l'idée qu'aux fins de la délimitation du plateau continental il y a îles et îles — je paraphrase, vous l'aurez remarqué, la célèbre formule de Gidel: «il y a détroits et détroits» — cette idée a été reprise par une abondante doctrine et confirmée par la pratique des Etats, mais dans la doctrine comme dans la pratique des Etats, c'est toujours, comme dans la déclaration du Commander Kennedy, d'îles dépendantes qu'il s'agit, jamais d'Etats insulaires.

Je n'infligerai pas à la Cour une revue exhaustive de la doctrine. Je me bornerai à noter que, si certaines études écartent implicitement le cas des Etats insulaires pour ne viser que celui des îles dépendantes — par exemple, celles de MM. Ely et Goldie (Ely, «Seabed Boundaries between Coastal States: The Effect To Be Given Islets as "Special Circumstances"», *International Lawyer*, vol. 6, 1982, p. 219 et suiv., notamment p. 219, 223, 231, 234, 236; Goldie, «The ICJ's "Natural Prolongation" and the Continental Shelf Problem of Islands», *Netherlands Yearbook of International Law*, vol. IV, 1973, p. 237 et suiv., notamment p. 247) — d'autres sont au contraire tout à fait explicites. Je pense, par exemple, à un récent article de M. Karl («Islands and the Delimitation of the Continental Shelf: A Framework for Analysis», *American Journal of International Law*, vol. 71, 1977, p. 642 et suiv.), dans lequel l'auteur déclare ne se préoccuper que des îles dépendantes et ajoute «it is assumed that independent insular States should be treated no differently from mainland States» (p. 642, note 3; cf. p. 667, note 99, et p. 668, note 108). Je pense également à un article déjà un peu plus ancien de M. Delin («Shall Islands Be Taken into Account when Drawing the Median Line According to Article 6 of the Convention on the Continental Shelf?», *Nordisk Tidsskrift for International Ret*, vol. 41, 1971, p. 205 et suiv.). Je citerai aussi dans le même ordre d'idée une thèse de doctorat française, intitulée *L'emprise maritime de l'Etat côtier*, dans laquelle l'auteur, M. Apollis, souligne l'importance du statut politique de l'île et précise ce qui suit:

> «on sait, que les conditions imposées aux îles pour obtenir une emprise côtière normale ne concernent pas les Etats insulaires et les Etats archipels et n'affectent que les îles appartenant à un Etat côtier» (Paris, Pedone, 1981, p. 75, note 176).

Mais c'est à une remarque de l'ancien géographe du département d'Etat des Etats-Unis, M. Hodgson, que je me référerai surtout, en raison de l'expérience et de l'autorité de ce spécialiste des délimitations maritimes: les petits Etats insulaires, écrit-il, doivent bénéficier des mêmes attributs qu'un Etat continental. Il poursuit: «It is difficult to conceive of such a small State being deprived justifiably of shelf . . . merely on the basis of size.» Et il ajoute qu'avec le mouvement d'accession à l'indépendance des petites îles les questions de délimitation impliquant de petits Etats insulaires vont se multiplier. La Cour trouvera un extrait de l'étude de l'éminent géographe dans notre mémoire (**I**, MM, p. 57, par. 174).

La pratique conventionnelle confirme pleinement les indications de cette littérature. S'il est vrai, et il est vrai, que les accords de délimitation n'accordent parfois qu'un effet réduit à certaines îles, compte tenu de leur taille, situation ou population, cela ne concerne jamais, jamais des îles jouissant du statut étatique, mais toujours des îles dépendantes. Nous avons cité dans nos écritures de nombreux accords de délimitation reconnaissant la plénitude de leurs droits de plateau continental à des Etats insulaires, parfois tout petits (**I**, MM, p. 61-78, par. 185-187). Jamais un Etat insulaire, fût-il petit, n'a vu ses droits réduits parce qu'il aurait eu la malchance d'être insulaire et petit; aucun exemple contraire n'a pu être fourni par la Partie adverse. Bref, les délimitations conventionnelles — dans lesquelles pourtant les Etats pèsent parfois d'un poids concret inégal — infligent un démenti éclatant à la théorie discriminatoire que la Libye voudrait ériger en règle juridique.

Lorsque la Libye allègue que le «poids» à attribuer à des petites îles varie selon leur dimension, leur situation ou d'autres facteurs (**I**, ML, p. 90, par. 4.30), c'est exact — mais c'est exact seulement dans le cas d'îles dépendantes. Pour les îles-Etats, aucune discrimination de ce genre n'est faite ni par la doctrine ni par la pratique.

Aussi n'est-ce pas sans quelque surprise qu'on lit dans les écrits adverses que le droit international est indifférent au statut politique d'une île en matière de titre juridique ou de délimitation de plateau continental; le statut politique d'une île, soutient en toutes lettres la Libye, est sans pertinence en cette matière (**II**, CML, p. 72, par. 3.42; p. 96, par. 4.42), et Malte se voit reprocher d'attacher une importance injustifiée au fait qu'elle n'est pas seulement une île, mais un Etat insulaire: *not just an island but an island State* (**II**, CML, p. 73, par. 3.45).

Pour avancer une interprétation aussi inattendue du droit international, la Libye croit pouvoir s'appuyer sur la sentence arbitrale franco-britannique. Dans cette affaire, soutient-elle, le statut politique des îles Anglo-Normandes n'a joué aucun rôle significatif, et toute supposition que nous pourrions faire que ces îles auraient été traitées différemment si elles avaient constitué des Etats indépendants serait pure conjecture (**II**, CML, p. 92-93, par. 4.35).

Reprenons donc un instant la sentence. Que soutenait le Royaume-Uni? Il soutenait que les îles Anglo-Normandes «sont en fait des Etats insulaires jouissant, dans une large mesure, d'une indépendance politique, législative, administrative et économique de longue date» (par. 171). Et que soutenait la France? La France soutenait qu'il s'agit d'îles «qui n'ont pas la responsabilité directe de leurs relations extérieures, ce qui les distingue des Etats insulaires...» (par. 158). Bref, la question du statut politique des îles était clairement posée devant le tribunal par les parties. Cette question a-t-elle été indifférente au tribunal? Certainement pas, puisque le tribunal, loin de s'en désintéresser, a demandé des précisions à ce sujet à l'agent du Royaume-Uni (par. 172) et que, sur la base des renseignements fournis par ce dernier, le tribunal a conclu:

> «qu'il ne doit considérer les îles Anglo-Normandes que comme des îles du Royaume-Uni, et non pas comme des Etats semi-indépendants jouissant d'un titre particulier à leur plateau continental vis-à-vis de la République française» (par. 186).

Les îles Anglo-Normandes, a-t-il précisé plus loin, «sont des îles distinctes du Royaume-Uni, non pas des Etats distincts» (par. 190).

L'interprétation proposée par la Libye ne résiste pas, on le voit, à la lecture de cette sentence.

La doctrine ne s'est pas trompée sur le sens de cette dernière.

Dans son ouvrage *The Maritime Zones of Islands in International Law* (La Haye, Martinus Nijhoff, 1979), M. Clive Symmons, commentant les passages cités, écrit ce qui suit:

> «had the Channel Islands constituted *independent* Island States, their effect as continental basepoints would have been different» (p. 177). (Les italiques sont de moi.)

De même, M. Derek Bowett, tout en relevant les incertitudes quant aux conséquences exactes qu'aurait pu avoir l'indépendance des îles Anglo-Normandes sur la délimitation (*op. cit.*, p. 223), observe que la discussion détaillée du statut politique des îles par le tribunal «clearly suggests that political status is a relevant factor» (*op. cit.*, p. 224, note 59). Et M. Bowett ajoute que la manière dont le tribunal a tranché la question du plateau continental des îles Anglo-Normandes — c'est-à-dire la solution de l'enclave, pour parler clairement — «can have little value, as a "precedent", for island situations where the islands are separate States» (*op. cit.*, p. 226).

Monsieur le Président, j'espère ainsi avoir montré que la confusion entretenue par la Libye entre les îles dépendantes et les îles jouissant de l'indépendance étatique est contraire à la jurisprudence tout autant qu'à la pratique et aux vues de la doctrine. Sans doute l'exemple des îles dépendantes n'est-il pas entièrement dépourvu d'intérêt pour notre affaire, et c'est pour cette raison que nous y avons nous-mêmes fait référence: car il est précieux de noter que même des îles dépendantes de petite taille ont été parfois pleinement prises en compte dans la délimitation du plateau continental. Il n'en demeure pas moins que les deux situations ne sont pas juridiquement assimilables: les nuances et distinctions qui s'appliquent aux îles dépendantes, notamment selon leur taille, sont sans pertinence aucune à l'égard des Etats insulaires.

Si Malte était terre italienne ou terre grecque, on pourrait se demander quel effet il conviendrait de lui attribuer, compte tenu de son caractère insulaire et de sa petite dimension, dans une délimitation italo-libyenne ou gréco-libyenne. Mais Malte n'est ni territoire italien ni territoire grec. Malte est territoire maltais. Malte est un Etat.

Si un Etat insulaire est une île, il est aussi, et peut-être même avant tout, un Etat. Et à ce titre l'Etat insulaire jouit, quelle que soit sa taille et malgré son caractère insulaire, de la plénitude des droits et attributions de l'Etat. Une fois de plus nous croisons sur notre chemin le principe de l'égalité des Etats.

Ce principe, que nous rencontrons à tous les carrefours, gêne la Partie adverse, on le comprend. Elle ne peut pas en nier l'existence, et elle est condamnée à admettre que «l'égalité des Etats est un principe fondamental du droit international» (**II**, CML, p. 78, par. 4.04). Comment fait-elle alors pour s'en débarrasser? Elle recourt à un procédé qui la séduit malheureusement trop souvent: déformer notre thèse afin de mieux pouvoir la tourner en ridicule. L'égalité des Etats signifierait, dans la conception de Malte telle qu'interprétée par la Libye, que, puisque Malte et la Libye sont des Etats égaux, ils devraient recevoir des superficies identiques de plateau continental. Ce qui signifierait, toujours selon la position de Malte telle qu'interprétée par la Libye, que toutes les délimitations doivent être effectuées sur la base de l'équidistance. Ce qui signifierait enfin, poussé à l'extrême, qu'en vertu du principe d'égalité les Etats devraient avoir tous des territoires de même dimension, des populations égales, des niveaux économiques comparables. Voilà comment, Monsieur le Président, la Partie adverse croit lire l'égalité des Etats dans la pensée maltaise (**II**, CML, p. 79 et 80, par. 4.06 et 4.07).

Le caractère excessivement caricatural de ces descriptions n'appelle pas de longues observations. Nous n'avons jamais dit que l'égalité des Etats exige une répartition égale du plateau continental entre Malte et la Libye. Nous avons tout au contraire fait ressortir que la Libye aurait, même dans le cas de la ligne médiane préconisée par Malte, une superficie de plateau continental considérablement plus grande que celle relevant de Malte (**I**, MM, p. 36, par. 117). Et M. Mizzi s'est longuement expliqué sur ce point.

La remarque libyenne selon laquelle la sentence arbitrale de 1977 aurait «disposé de la prétention maltaise» de façon *«crystal clear»* est hors de propos. Certes, je le sais, la sentence franco-britannique écarte au paragraphe 195 l'argument français fondé sur l'égalité des Etats, mais pourquoi l'a-t-elle fait? Parce que cet argument conduisait à l'attribution de parts égales, de superficies égales, ainsi qu'il ressort clairement de l'analyse de la thèse française qui figure au paragraphe 165 *in fine* de la sentence elle-même. Mais ce n'est pas cela que Malte demande. Ce que Malte demande, sur le fondement de l'égalité des Etats, ce n'est pas du tout, mais pas du tout, un partage égal des superficies du plateau continental, mais la consécration d'une position d'égalité dans l'opération de délimitation du plateau continental — même si l'un des Etats est continental et de taille importante, et l'autre insulaire et de taille réduite. Face au droit de la délimitation maritime, le «small group of islands» qu'est Malte vaut autant et pèse aussi lourd que l'énorme «continental landmass» qu'est la Libye. Voilà la vérité majeure, contre laquelle la Libye tente en vain de s'insurger.

Monsieur le Président, l'Etat maltais n'a jamais prétendu un seul instant bénéficier d'un statut spécial ou privilégié.

Ce que l'Etat maltais soutient, c'est qu'en tant qu'Etat, en tant que membre à part entière de l'Organisation des Nations Unies et des organisations internationales — tout le monde connaît le rôle qu'il a joué dans l'élaboration du droit de la mer — Malte est placée sur un pied d'égalité avec l'Etat libyen aux fins de la présente délimitation.

Affirmer ou impliquer le contraire, comme n'hésite pas à la faire la Libye, c'est méconnaître un principe fondamental du droit et des relations internationales.

L'inégalité concrète des Etats sur le plan du développement économique a conduit certains à s'élever contre la situation dominante que l'égalité des Etats sur le plan juridique peut assurer aux «grands» vis-à-vis des «petits», et l'idée a été émise — en particulier par mon ami le doyen Colliard — de remédier à cette domination de fait au moyen de ce qu'il a appelé une inégalité compensatrice. La Cour n'acceptera pas, Malte en est persuadée, qu'en matière de délimitation du plateau continental la protection que le principe de l'égalité souveraine des Etats assure aux «petits» soit balayée par des privilèges juridiques exorbitants accordés aux «grands»; faute de quoi l'inégalité compensatrice ferait place à une inégalité aggravatrice.

Ainsi s'effondre, Monsieur le Président, Messieurs les juges, la tentative de la Partie adverse de faire dévier le concept de côtes vers un concept différent, qui n'a rien à voir avec lui. Apparemment la Libye parle «côtes»; en réalité elle veut faire passer sous ce pavillon les masses continentales respectives des deux pays et le contraste entre le caractère insulaire de Malte et le caractère continental de la Libye. Pour Malte, au contraire, les côtes sont les côtes, et pas autre chose; une île-Etat est un Etat comme un autre; et les côtes d'un Etat insulaire ont le même pouvoir générateur de droits et juridictions maritimes et pèsent aussi lourd dans la délimitation du plateau continental que les côtes de n'importe quel autre Etat côtier.

La dénaturation du concept de côtes par la Libye ne s'arrête pourtant pas là.

La Libye lit en effet le vocable de «côtes» comme synonyme pour l'essentiel de «longueur de côtes». Les côtes de Malte étant moins longues que celles de la Libye, elles engendrent des droits moins importants de plateau continental. Voilà ce qu'on peut lire de la première à la dernière page des écrits libyens.

Ce problème intéresse la question de la proportionnalité des longueurs de côtes, déjà évoquée par M. Mizzi et sur laquelle reviendra en détail mon ami Ian Brownlie. Je me bornerai, pour ma part, à évoquer la longueur des côtes dans le contexte d'une controverse un peu spéciale suscitée par la Libye à propos des points de base.

Ainsi que la Cour l'a noté, la Partie adverse nous reproche, à plusieurs reprises, de substituer «points de base» et lignes de base à «côtes». Apparue dans le contre-mémoire de la Libye (**II**, CML, p. 37, par. 2.39; p. 42, par. 2.49, p. 159, par. 7.23), cette accusation occupe une place importante dans la réplique. Malte est clouée au pilori pour avoir confondu points de base et côtes (ci-dessus, RL, p. 44, par. 4.33) et pour avoir oublié que ce sont les côtes, et non pas des points de base en tant que tels, qui engendrent des droits maritimes (*ibid.*, p. 45, par. 4.36; p. 58, par. 5.13).

Ce qu'il y a derrière cette surprenante accusation, c'est la tentative libyenne de réduire la géographie côtière à une longueur côtière mesurée en kilomètres ou en milles, grâce en quelque sorte à un instrument d'arpentage que l'on déroulerait le long des côtes.

La longueur des côtes constitue sans doute l'un des éléments de la géographie côtière, nul n'en disconviendra; elle ne saurait pour autant être regardée comme le facteur décisif, et moins encore comme le facteur exclusif, de la géographie côtière au regard de la génération des droits de plateau continental.

La Libye paraît oublier que, selon une règle aujourd'hui bien établie, et dont portent témoignage les articles 57 et 76 de la convention sur le droit de la mer, la largeur de la zone économique exclusive et du plateau continental est calculée par rapport aux «lignes de base à partir desquelles est mesurée la largeur de la mer territoriale», et que ces lignes de base peuvent être des «lignes de base droites reliant des points appropriés», selon les dispositions de l'article 7 de la même convention. Si c'était la longueur effective des côtes, en tant que telles, qui constituait le facteur générateur des droits maritimes, la technique des lignes de base droites ne serait pas admissible. Au regard du plateau continental et de la zone économique exclusive, comme au regard de la mer territoriale, les lignes de base sont regardées par le droit international comme une expression juridiquement valable des côtes. Ce n'est pas un hasard si l'on parle couramment, par raccourci, de «200 milles marins des côtes», au lieu de dire, ce qui serait plus précis: «200 milles marins des lignes de base à partir desquelles est mesurée la mer territoriale». Cet usage de langage assimilant «lignes de base» et «côtes» est révélateur.

Mais la Libye paraît oublier surtout que, pour la fixation de la limite extérieure de la mer territoriale, le droit international a depuis longtemps abandonné la méthode dite du tracé parallèle, qui consiste à suivra la côte ou les lignes de base dans toutes leurs inflexions, au profit de la méthode dite de la courbe tangente, ou des enveloppes des arcs de cercle, qui repose précisément sur la technique des points de base. Cette méthode consiste, s'il m'est permis de le rappeler, à calculer la largeur de la mer territoriale à partir de quelques points de base seulement et à négliger en conséquence d'autres points de la côte, qui sont ainsi «perdus» pour cette construction. Nous avons donné des explications détaillées sur cette méthode, aujourd'hui érigée en règle de droit par l'article 4 de la convention de 1982, dans notre réplique écrite à laquelle je prie respectueusement la Cour de bien vouloir se reporter (ci-dessus, RM, p. 48-50, par. 89-95). Ce que je retiendrai ici, c'est seulement ceci: le droit international n'a apparemment vu rien de condamnable dans ce que la Partie adverse appelle la substitution de points de base aux côtes. Les points de base sont utilisés, exactement comme le sont les lignes de base, parce qu'ils expriment la configuration réelle de la côte, et dans la mesure où ils l'expriment. Puis-je me permettre de rappeler qu'en décrivant la méthode de la courbe tangente en 1951, à une époque où cette méthode était déjà répandue en pratique mais n'était pas encore obligatoire en droit, la Cour a déclaré que «son but est d'assurer l'application du principe que la ceinture des eaux territoriales doit suivre la ligne de la côte» (affaire des *Pêcheries, C.I.J. Recueil 1951*, p. 129)? Côtes, lignes de base et points de base sont des aspects d'une seule et même réalité géographique.

La leçon qui se dégage de ces observations est claire: en essayant d'établir une opposition entre le concept de côtes, d'une part, et la méthode des points et lignes de base, d'autre part, la Libye mène un combat d'arrière-garde: d'ores et déjà le droit international lui a donné tort.

Il est assez piquant, au demeurant, de voir la Libye s'en prendre ainsi à la ligne de délimitation préconisée par Malte au nom d'une prétendue non-représentation des côtes qui serait due, à en croire la Libye, à l'utilisation de la technique des points de base. En quoi — on aimerait le savoir — une ligne qui suivrait la direction de la soi-disant *Rift Zone* serait-elle représentative de la configuration côtière des deux pays?

C'est sans doute parce qu'elle est consciente du caractère désespéré de sa tentative que la Partie adverse, dans un ultime sursaut, se plaint de ne pas vraiment connaître les points de base sur lesquels Malte s'appuie (**I**, ML, p. 47, note 5; **II**, CML, p. 37, note 2; ci-dessus, RL, p. 58, par. 5.13).

Monsieur le Président, dans son premier écrit déjà, Malte a indiqué que les lignes de base droites à partir desquelles est mesurée la largeur de sa mer territoriale — et donc calculée sa ligne médiane — joignent vingt-six points et que ces lignes étaient illustrées sur la carte n° 2 annexée au mémoire (**I**, MM, p. 16,
㊷ par. 31-32). La Cour trouvera ces mêmes lignes reproduites sur la figure 11 de

notre dossier. Ces lignes, que la Libye connaissait donc, ont été notifiées à la Libye en 1972 et ont été utilisées en 1973 pour l'octroi des licences d'exploration. La Libye a élevé certaines objections contre l'utilisation comme point de base du rocher de Filfla, comme l'a rappelé mon ami, M. Mizzi (cf. ci-dessus, RM, p. 10, par. 11; RL, p. 35, note 1). L'ignorance dans laquelle la Libye se plaint d'avoir été maintenue au sujet des lignes de base de Malte est d'autant plus inattendue que la Libye a fait état de notre carte n° 2 dans ses propres écritures (**II**, CML, p. 35, par. 2.35). ⑭

Voilà, Monsieur le Président, pour le prétendu «mystère» qui, à en croire la Partie adverse, affecterait les points et lignes de base de Malte (**I**, ML, p. 13, par. 1.11). De «mystère», il n'y en a certainement pas.

La tentative de la Partie adverse de faire dériver le concept de géographie côtière vers celui de longueurs côtières s'effondre ainsi d'elle-même. La longueur des côtes est un élément de la configuration côtière, parmi d'autres; elle n'exprime pas à elle seule la configuration côtière. Glisser de la proposition: les droits de plateau continental sont engendrés par la géographie côtière, et leur étendue dépend de la géographie côtière des deux pays concernés, à la proposition: les droits de plateau continental sont engendrés par les longueurs côtières, et leur étendue dépend des longueurs côtières des deux pays concernés, reviendrait à prétendre que, si un kilomètre de côtes de l'un des Etats engendre une étendue donnée de plateau continental, dix kilomètres de côtes de l'autre Etat engendrent une étendue dix fois supérieure de plateau continental. Ce serait faire des longueurs côtières une source directe du titre au plateau continental, une source autonome de délimitation, ce à quoi se refuse la totalité de la jurisprudence, jusques et y compris le récent arrêt du *Golfe du Maine* (*C.I.J. Recueil 1984*, p. 323, par. 185, et p. 334-335, par. 218), tout comme s'y refuse la pratique des Etats.

J'en ai ainsi terminé, Monsieur le Président, Messieurs les juges, avec la première composante du principe de distance, c'est-à-dire le concept de côtes. Les conclusions auxquelles je pense être parvenu sont évidentes; elles le sont même tellement que sans les extraordinaires théories libyennes je ne me serais pas cru autorisé à développer devant la Cour de telles banalités. Le titre juridique au plateau continental de Malte et de la Libye, appelé à intervenir dans le processus de délimitation, ne se trouve ni dans les masses continentales situées derrière les côtes des deux pays, ni dans le caractère insulaire ou continental des deux Etats, ni dans les longueurs de leurs côtes mesurées au cordeau. Il se trouve dans les côtes de Malte et de la Libye telles qu'elles sont exprimées dans les lignes et points de base établis et retenus en conformité avec le droit international.

### 2. *La «distance»*

Monsieur le Président, nous venons de creuser le concept de «côtes», ou du moins de l'évoquer; il nous reste à tenter de mieux appréhender celui de «distance par rapport aux côtes».

Ce qui me retiendra d'abord, dans le cadre de ces développements, c'est la composante spatiale du principe de distance, c'est-à-dire le fait que l'extension du titre de l'Etat côtier sur le plateau continental et l'étendue de ses droits vis-à-vis d'Etats voisins se définissent par une certaine distance, mesurée à la surface de la mer, par rapport aux lignes ou points de base représentatifs des côtes. L'existence et en tout cas la pertinence de ce concept pour notre affaire sont contestées par la Partie adverse: je m'efforcerai donc d'établir et l'existence et la pertinence de ce concept pour notre affaire à la lumière du droit international coutumier tel qu'il a trouvé expression dans l'article 76 de la convention sur le droit de la mer.

Après quoi, dans un second temps, je m'attacherai à la manière dont le principe de distance, conçu comme un rapport de caractère spatial avec les côtes est mis en œuvre concrètement. Ce sera pour moi l'occasion d'évoquer le principe et la technique de la projection radiale.

*Le concept de distance et l'article 76, paragraphe 1, de la convention sur le droit de la mer de 1982*

La position de la Libye à l'égard de la règle exprimée dans l'article 76, paragraphe 1, de la convention sur le droit de la mer est complexe. Si je l'ai bien comprise, elle peut se résumer dans les propositions suivantes:

Premièrement: la Libye semble admettre, comme je l'ai déjà indiqué, que le concept de distance joue un rôle important en matière de zone économique exclusive (**II**, CML, p. 101, par. 4.52), mais elle considère que la zone économique exclusive est étrangère à la présente affaire. Je me suis déjà expliqué sur ce point.

Deuxièmement: en ce qui concerne spécifiquement le plateau continental, la Libye ne paraît plus, dans le plus récent état de sa pensée, mettre en doute, comme elle le faisait dans le mémoire, la valeur coutumière de la règle qui a trouvé son expression dans l'article 76, paragraphe 1, mais peut-être d'autres explications nous seront-elles fournies sur ce point dans quelques jours.

Troisièmement: en vue d'atteindre son objectif primordial, qui est de mettre la présente délimitation à l'abri du principe de distance dans l'espoir de conserver ses chances au prolongement naturel physique, la Libye érige une double ligne de défense.

La Libye soutient d'abord que l'article 76, paragraphe 1, régit seulement la base juridique du titre au plateau continental et la détermination de sa limite extérieure, et qu'il n'intéresse pas la délimitation du plateau continental entre Etats voisins. Cette négation de toute corrélation entre titre et délimitation forme la ligne de défense rapprochée érigée par la Libye dans l'espoir de préserver la délimitation de toute contamination du principe de distance. J'ai évoqué hier cette question des rapports entre titre juridique et délimitation, et je n'y reviendrai pas.

Mais, pour renforcer cette tentative de prophylaxie, la Libye s'en prend, dans un second volet de son argumentation, au principe de distance sur le plan du *entitlement* lui-même. C'est là la ligne de défense éloignée, dont l'objectif est de stériliser sur le plan du titre juridique, à la racine si j'ose dire, le principe de distance tant redouté. Cette mise en question du principe de distance sur le plan du titre juridique prend la forme d'une exégèse complexe et laborieuse du paragraphe 1 de l'article 76, et c'est sur cet aspect précis de l'argumentation libyenne que je voudrais m'arrêter ici.

L'article 76, paragraphe 1, de la convention sur le droit de la mer de 1982 fait-il, ou ne fait-il pas, de la distance l'élément central du titre juridique au plateau continental et le critère déterminant de sa limite extérieure? Nous parlons ici de titre vers le large et non pas de délimitation.

Pour apporter à cette question la réponse négative conforme à ses vues, la Libye propose de lire cette disposition comme confirmant le principe traditionnel du prolongement naturel au sens géologique et géomorphologique du terme en tant que critère «principal» du titre juridique au plateau continental *(main, primary, fundamental, essential)* voilà les mots qu'elle emploie — et c'est seulement à ce titre «subsidiaire» ou «secondaire» *(subsidiary, secondary)* que, selon la Libye, l'article 76 ferait intervenir le critère spatial de la distance à partir des lignes de base (**I**, ML, p. 87-89, par. 6.18-6.20; **II**, CML, p. 98-99, par. 4.47-4.48; ci-dessus, RL, p. 21, par. 3.07-3.08). Cette argumentation destinée, je le répète, à détruire à la racine même, sur le plan éloigné du titre juridique, le principe de distance se trouve exposée dans le mémoire, dans le contre-mémoire et dans la réplique libyens.

A l'appui de cette interprétation minimisante du principe de distance dans l'article 76, la Libye croit pouvoir invoquer la genèse de cette disposition au cours des travaux de la troisième conférence. A en croire la Libye, la troisième conférence aurait cherché par là à donner une importance nouvelle et prééminente au prolongement naturel, et c'est seulement à titre exceptionnel et marginal, à contre-cœur en quelque sorte, qu'elle aurait introduit la distance dans notre disposition. Loin d'avoir été affaibli par l'article 76, le prolongement naturel physique serait sorti renforcé des travaux de la conférence. Voilà ce que voudrait nous faire croire la Partie adverse (**I**, ML, p. 89, par. 6.20).

Cette lecture de l'article 76 comme ayant insufflé au prolongement naturel physique une sorte de seconde jeunesse ne manquera pas de surprendre. Les travaux de la conférence ne montrent-ils pas, tout au contraire, ainsi que je l'ai rappelé, que la substitution, au critère physique des 200 mètres de profondeur, d'une distance uniforme, indépendante des hasards des caractéristiques sous-marines, a été conçue par la conférence comme un facteur de correction des inégalités, et que c'est seulement en vue de ne pas léser les quelques Etats pourvus par la nature d'une marge continentale particulièrement large que la conférence a conservé — pour eux et eux seuls — le critère du prolongement naturel? Critère «fondamental», «primaire», «essentiel», «principal», nous dit la Libye à propos du prolongement naturel. Mais comment la suivre si l'on connaît le déroulement des travaux de la troisième conférence et comment la suivre alors que, précisément, la conférence n'a pas permis, même pour les Etats à marge continentale large, au critère du prolongement naturel physique de jouer à plein? Car les Etats à large marge continentale eux-mêmes ne peuvent pas exercer leurs droits de plateau continental jusqu'à la limite effective de leur prolongement naturel physique; et chacun sait à quels difficiles débats a donné lieu cette question à la conférence. Pas davantage ne saurait-on oublier que cette limite assignée à l'épanouissement du prolongement naturel physique dans toute sa plénitude, même pour les Etats à marge continentale large, a consisté, précisément, à recourir, même dans ce cas, au critère de la distance — puisque la suite de ce même article 76 arrête les droits de plateau continental en tout état de cause à 350 milles marins des lignes de base ou à 100 milles marins de l'isobathe des 2500 mètres. Monsieur le Président, la limite des 200 milles n'a rien, mais vraiment rien de «subsidiaire» ou de «secondaire». Elle correspond d'abord à la situation la plus fréquente, à la normale en quelque sorte. Elle constitue ensuite la distance de référence par rapport à laquelle se définissent à la fois l'extension des droits de plateau continental plus loin vers le large dans certaines situations et la limite maximale de cette extension. La distance est partout dans cette matière.

L'article 76 énonce une règle en deux parties, sans établir de hiérarchie entre une partie qui serait essentielle et une partie qui serait secondaire. Ces deux parties sont de valeur égale et sont placées sur le même plan. Jusqu'à 200 milles des lignes de base, c'est la distance seule qui fonde le titre juridique de l'Etat côtier. Au-delà des 200 milles l'Etat côtier n'a de titre juridique sur les fonds marins que dans la mesure où sa marge continentale au sens physique du terme s'étend plus loin vers le large, mais même dans ce cas ses droits sont enfermés dans des limites de caractère spatial.

Dans le pénétrant et riche rapport qu'il a présenté au colloque de Rouen déjà cité de la Société française pour le droit international, mon ami et collègue M. Quéneudec a évoqué ce qu'il a appelé «la règle générale des 200 milles». Cette règle, dit-il, a été établie par l'article 57 de la convention comme «un maximum pour la zone économique» et par l'article 76 comme «un minimum pour le plateau continental». D'où il résulte que le plateau continental

> «ne se présente plus seulement comme une notion naturelle englobée dans le concept géologique de «marge continentale», il est également conçu par le texte de la convention comme une *notion artificielle fondée sur un critère de distance*» (*op. cit.*, p. 133-134). (Les italiques sont de moi.)

De critère «principal» et de critère «secondaire», M. Quéneudec ne fait, à juste titre, aucune mention.

Dans l'espoir de prêter un semblant de plausibilité juridique à sa thèse de la hiérarchie entre une disposition principale et une disposition subsidiaire (celle sur la distance étant qualifiée de subsidiaire), la Libye appelle à son aide la Cour elle-même. A l'en croire, en effet, c'est cette thèse du caractère subsidiaire et secondaire de la distance qui se trouverait confirmée par le paragraphe 47 de l'arrêt *Tunisie/Libye* auquel j'ai déjà eu plusieurs fois à me référer (**II**, CML, p. 99, par. 4.48; ci-dessus, RL, p. 21, par. 3.07).

Que dit donc la Cour dans ce passage?

Elle commence par déclarer que la définition du premier paragraphe de l'article 76 «comprend deux parties, faisant appel à des critères différents». Après quoi la Cour énonce:

> «D'après la première partie du paragraphe 1, c'est le prolongement naturel du territoire terrestre qui est le critère principal. Dans la deuxième partie du paragraphe, c'est la distance de 200 milles qui fonde dans certaines circonstances le titre de l'Etat côtier.» (*C.I.J. Recueil 1982*, p. 48.)

La Libye souligne dans ses écrits le mot «principal» — *«the main criterion»* — et elle en déduit que, puisque le prolongement naturel est le «critère principal», la distance ne peut être que le critère secondaire.

Mais, Monsieur le Président, ce n'est pas du tout cela que la Cour a dit. La Cour n'a pas déclaré: «D'après le premier paragraphe de l'article 76 [le premier paragraphe tout entier], c'est le prolongement naturel qui est le critère principal.» La Cour n'a pas dit cela. La Cour a déclaré: «D'après la première partie [c'est-à-dire la première phrase] du paragraphe 1, c'est le prolongement naturel ... qui est le critère principal», c'est-à-dire lorsque la marge continentale s'étend au-delà de 200 milles des lignes de base, ce qui est tout à fait différent. Il est évident que dans le cas des Etats à marge continentale large c'est le prolongement naturel qui constitue le critère principal. Mais de là à établir une hiérarchie à l'intérieur du paragraphe 1, comme le fait la Libye, il y a un pas que rien n'autorise à franchir. La Cour n'a établi aucune hiérarchie de ce genre; elle a parlé de «deux parties, faisant appel à des critères différents», sans dire en aucune manière que l'une des parties ou l'un des critères serait plus «fondamental» ou plus «primaire» que l'autre.

Une opinion individuelle dans la même affaire *Tunisie/Libye* fait observer que «le critère de distance ... doit être considéré comme cristallisant d'ores et déjà une règle de droit international coutumier» (*C.I.J. Recueil 1982*, opinion individuelle de M. Jiménez de Aréchaga, p. 114, par. 52). De critère «secondaire» ou «subsidiaire» il n'est, dans cette opinion, pas davantage question.

La Libye ne peut décidément pas espérer mobiliser la Cour au service de sa tentative de réduire à un rang mineur, subalterne, le principe de distance dans la philosophie du plateau continental de l'article 76.

Monsieur le Président, au terme de ces observations, le bilan est facile à dresser.

Les efforts tous azimuts déployés par la Libye en vue de minimiser à tout prix la présence de la distance dans la nouvelle conception — et, par voie de conséquence, dans la délimitation — du plateau continental, il ne reste rien. Les faits sont là, et les faits sont têtus. Le titre juridique au plateau continental repose aujourd'hui essentiellement sur la corrélation spatiale entre les côtes et les fonds marins adjacents à ces côtes situés à une certaine distance de ces dernières, et l'étendue des droits de plateau continental de l'Etat côtier est dictée par la conjugaison de la géographie côtière et de la distance par rapport à ces côtes.

Le rapprochement du plateau continental et de la zone économique exclusive revient à l'esprit, puisque la zone économique exclusive englobe les juridictions et droits souverains de l'Etat côtier aussi bien sur les fonds marins et leur sous-sol que sur la colonne d'eau et que les limites extérieures du plateau continental et de la zone économique exclusive coïncideront dans la majorité des cas, ou dans bien des cas en tout cas. On comprend que certains soient allés jusqu'à évoquer l'absorption partielle (c'est-à-dire en deçà de 200 milles marins des lignes de base) du plateau continental et de la zone économique exclusive. On lit ainsi dans une opinion jointe à l'arrêt de 1982:

> «il est difficile de nier que, tout au moins pour le plateau continental ne dépassant pas 200 milles, la notion même de plateau continental soit en voie d'être assimilée ou intégrée à celle de zone économique exclusive» (*C.I.J. Recueil 1982*, opinion individuelle de M. Jiménez de Aréchaga, p. 115, par. 55; cf. *ibid.*, opinion dissidente de M. Oda, p. 249, par. 146).

Dans le même esprit, M. Quéneudec a observé, dans le rapport déjà cité au colloque de Rouen, que par le jeu de l'article 76

> «un complément est accordé forfaitairement à l'Etat côtier, de manière à faire coïncider la limite extérieure de son plateau continental et la limite de la zone économique exclusive qu'il est en droit d'instituer» (*op. cit.*, p. 134).

Ce rapprochement entre la conception du plateau continental et celle de la zone économique exclusive ne peut pas demeurer sans effet sur le plan de la délimitation. Comme l'a dit une autre opinion en 1982:

> «dans la nouvelle conception du plateau continental comme dans celle de la zone économique exclusive, le critère de distance joue désormais un rôle déterminant dans la détermination de l'étendue des zones respectives... Le critère de la distance ... est appelé à remplacer le prolongement naturel comme critère de délimitation du plateau continental» (*C.I.J. Recueil 1982*, opinion dissidente de M. Oda, p. 257, par. 160, et p. 270, par. 182; cf. p. 249, par. 146).

Ces observations prennent un relief particulier à la lumière d'un passage du récent arrêt du *Golfe du Maine*:

> «il est ... à prévoir [écrit la Chambre] que, avec l'adoption progressive, par la plupart des Etats maritimes, d'une zone économique exclusive et, par conséquent, avec la généralisation de la demande d'une délimitation unique, ... la préférence ira désormais, inévitablement, à des critères se prêtant mieux, par leur caractère plus neutre, à une délimitation polyvalente» (*C.I.J. Recueil 1984*, p. 327, par. 194).

D'où la Chambre tire la double conséquence que le critère de base de la délimitation doit être la géographie des côtes et que les méthodes destinées à le mettre en application doivent être des méthodes géométriques (*ibid.*, p. 327, par. 195, et p. 329, par. 199). Monsieur le Président, Messieurs les juges, je pose la question: quel critère plus neutre, plus géométrique, pour mettre en œuvre le concept fondamental d'adjacence, peut-on imaginer que celui de la distance à partir des côtes?

Il n'y a pas lieu ici d'examiner, et je ne m'aventurerai pas dans ce domaine, le problème de savoir dans quelle mesure la délimitation du plateau continental et la délimitation de la zone économique exclusive doivent ou non coïncider. C'est un autre problème. Il s'agit dans notre affaire, nous sommes d'accord avec la Partie adverse sur ce point, de la délimitation du plateau continental entre Malte et la Libye, et de rien d'autre. La question de la zone économique exclusive doit néanmoins, je l'ai déjà relevé, demeurer présente à l'esprit.

Ayant ainsi établi le rôle du concept de distance, il me reste à m'interroger sur sa mise en œuvre concrète. C'est à cet aspect du problème que je souhaiterais consacrer la fin de mes développements relatifs au principe de distance.

### *La mise en œuvre du concept de distance: la projection radiale à partir des côtes*

La Libye reconnaît que la côte constitue «le point de départ ... de l'exercice de délimitation» (**II**, CML, p. 157, par. 7.18). C'est effectivement, nous l'avons vu, ce que décide une jurisprudence unanime, depuis l'arrêt sur le *Plateau continental de la Mer du Nord* de 1969 jusqu'à l'arrêt de 1984 sur le *Golfe du Maine*. Ce que la Libye omet toutefois de préciser, c'est que le titre de l'Etat côtier sur une certaine étendue de fonds marins tant vers le large que vis-à-vis d'Etats voisins ne se trouve pas dans les côtes prises en elles-mêmes, mais dans une corrélation entre ces côtes et les espaces maritimes adjacents situés devant elles.

Comment, en effet, les droits de l'Etat côtier vont-ils être déterminés concrètement?

Lorsqu'il s'agit de définir les espaces maritimes dans l'absolu, c'est-à-dire vers le large et sans avoir à tenir compte de l'existence d'un Etat voisin, le meilleur moyen consiste à tracer des arcs de cercle de la distance voulue à partir de points de la côte. En ce qui concerne plus précisément la limite extérieure du plateau continental, on commencera donc en pratique par tracer des arcs de cercle d'un rayon de 200 milles, puisque aucun droit de plateau continental n'est aujourd'hui inférieur à 200 milles. Mais même pour les Etats à marge continentale large, il sera nécessaire de commencer par là, puisque l'extension éventuelle de leur plateau au-delà ne pourra s'établir que par référence à cette limite de 200 milles. De manière plus précise, on aura recours à la technique de l'enveloppe des arcs de cercle, mise au point naguère pour la limite extérieure de la mer territoriale et à laquelle je me suis déjà référé (cf. ci-dessus, RM, p. 47-50, par. 87-95). Cette technique, qui prend appui, je le rappelle, sur certains points représentatifs des côtes, les points de base, permet de concrétiser la projection de la côte vers la mer adjacente dans toutes les directions; elle permet de créer cette «ceinture» dont la Cour a parlé à propos de la mer territoriale (*C.I.J. Recueil 1951*, p. 129) et qui se retrouve chaque fois qu'un espace se définit ou se mesure par une certaine distance à partir des côtes. Le mot de «ceinture», la Cour n'aura pas manqué de le noter, est particulièrement approprié dans le cas d'une île: un Etat insulaire, même petit, situé au milieu de l'océan, engendre une vaste ceinture de plateau continental grâce à la projection radiale et multidirectionnelle à partir des points de base représentatifs de ses côtes. C'est ce qui explique ce phénomène bien connu que des Etats insulaires de dimension réduite puissent attirer un domaine maritime absolument hors de proportion avec leur superficie terrestre. Nous avons cité dans nos écritures l'exemple, que nous avons puisé dans l'ouvrage de M. Lucchini et de M. Voelckel, *Les Etats et la mer*, de l'île de Nauru dont la superficie terrestre de 21 kilomètres carrés engendre une zone économique exclusive près de dix mille fois plus étendue (ci-dessus, RM, p. 44, par. 78).

Dans l'affaire du *Golfe du Maine*, M. Jaenicke, conseil du Canada, s'est exprimé à ce sujet dans les termes suivants:

> «the coastal State's jurisdiction extends into the sea without any predetermined direction; it extends . . . "radially" . . . It may suffice here to call attention to the situation of an isolated insular coast in the ocean. Nobody would deny, for example, the Hawaian islands a radial seaward projection of their coasts in all directions.» (*C.I.J. Mémoires*, vol. VII, p. 46.)

Sur ce premier point, je pense, la Partie adverse ne nous apportera aucune contradiction. Ce qu'elle nous objectera, je le devine, c'est que Malte précisément n'est pas située au milieu d'un vaste océan et qu'il ne s'agit pas dans notre affaire de limites extérieures mais de délimitation.

Il est vrai que la situation respective de Malte et de la Libye ne permet d'accorder à aucun des deux Etats cette «ceinture» — je reprends le mot de la Cour — complète de 200 milles marins au moins de plateau continental à laquelle conduirait l'application de la méthode des arcs de cercle tracés à partir des points de base appropriés de chacun d'eux. L'essence même de la délimitation consiste, je l'ai noté, à amputer les droits de chacun des deux Etats de manière équitable et raisonnable. Le choix de la méthode de délimitation n'est en définitive rien d'autre que le choix de la méthode appropriée pour tracer ce que j'appellerai la ligne d'amputation, c'est-à-dire pour fixer la distance à laquelle chacun des deux Etats devra accepter d'arrêter des projections qui, autrement, auraient pu s'épanouir vers le large jusqu'à une distance de 200 milles au moins.

Pour illustrer ces explications quelque peu abstraites, mais dictées finalement
par le bon sens, nous avons préparé une carte, que la Cour trouvera dans le dos-
㊸ sier qui lui a été remis sous le numéro 12 et à laquelle je la prie, très respec-
tueusement, de bien vouloir se reporter quelques instants.

Sur cette carte nous avons tracé, à titre d'échantillonnage, en couleur rouge,
des arcs de cercle de 200 milles marins à partir de deux points de base pris sur
les lignes de base droites de Malte, à savoir les points «m» et «n». Si la Cour
㊷ veut bien se reporter à la figure 11, elle constatera que ce sont là deux des trois
points de base qui contrôlent la ligne médiane du côté maltais.

㊸ Nous avons procédé de même sur la figure 12, en couleur noire, à partir de
cinq points pris sur les côtes de la Libye, à savoir les points «a», «c», «h»,
㊷ «i», et «j». Ce sont là, comme le montre à nouveau notre figure 11, cinq des
douze points de base qui contrôlent la ligne médiane du côté libyen. Il s'agit
donc d'un échantillonnage destiné à éclairer mon raisonnement.

Si Malte n'avait en face d'elle que la mer, son plateau continental s'étendrait au moins jusqu'à l'enveloppe de tous les arcs de cercle tracés sur le modèle de ceux qui figurent sur cette carte en rouge. Et si la Libye n'avait en face d'elle que la mer, son plateau continental s'étendrait également au moins jusqu'à l'enveloppe de tous les arcs de cercle tracés sur le modèle de ceux qui figurent sur cette carte en noir.

Mais telle n'est évidemment pas la situation réelle. La situation réelle est que les projections maltaises et les projections libyennes se chevauchent à certains endroits et que, de ce chevauchement, naît la nécessité d'une délimitation et, par conséquent, d'une diminution des droits de chacun. Il faudra donc déterminer une méthode permettant de stopper les deux projections avant que chacune d'elles n'atteigne son plein épanouissement et de réaliser cette amputation réciproque et mutuelle qui est l'essence même de l'exercice de délimitation.

On mesure, dans ces conditions, à quel point la théorie avancée par la Libye au sujet des côtes pertinentes dans la présente affaire est erronée.

La Libye soutient que seuls sont pertinents pour notre délimitation les segments de la côte maltaise et les segments de la côte libyenne qui se font face directement et sont rigoureusement parallèles.

En ce qui concerne la Libye — la Cour pourra suivre ce raisonnement sur la
㊷ figure 11 —, la Partie adverse ne reconnaît en conséquence de pertinence, pour la délimitation avec Malte, qu'au segment de la côte entre Ras Ajdir et Ras Zarrouq. Le reste de la côte libyenne, à l'est de Ras Zarrouq, est présenté comme étranger à la délimitation avec Malte, puisque faisant face non pas aux côtes maltaises, mais aux côtes d'Etats tiers, plus précisément aux côtes italiennes et grecques. Les côtes pertinentes libyennes, selon la Libye, s'arrêtent ici.

En ce qui concerne Malte, seuls sont pertinents, d'après la Libye, les segments de la côte maltaise qui font face directement à la côte libyenne, c'est-à-dire les segments orientés plein sud. Les autres segments de la côte maltaise, non orientés plein sud face à la Libye, sont déclarés étrangers à la délimitation avec la Libye. Etant donné le fameux «tild» de Malte, nous affirme-t-on, «seules de petites longueurs des îles maltaises peuvent être regardées comme faisant face directement à la Libye» (ci-dessus, RL, p. 78, par. 6.06). Il s'agit, est-il précisé dans les écritures libyennes, du segment de la côte de l'île de Malte
㊷ entre Delimara Point et Ras il-Qaws — que la Cour trouvera sur la figure 11 — d'une part, et «peut-être» (nous dit-on) du segment de la côte de l'île de Gozo entre Ras in-Newwiela et Ras il-Wardija, d'autre part. Si l'on se réfère, dit la Libye, aux lignes de base droites de Malte, et non plus aux côtes réelles, le segment pertinent se réduit à la ligne joignant Delimara Point à Filfla, car de Filfla à Ras il-Wardija la ligne de base «ne fait face à aucune côte libyenne mais fait face aux îles italiennes et à la côte de Tunisie» (**II**, CML, p. 35, par. 2.35).

Pour justifier cette thèse, la Libye s'appuie sur un passage de l'arrêt de 1982 sur lequel je reviendrai dans un instant.

Telle est la théorie présentée par la Libye (**I**, ML, p. 156-157, par. 10.08-10.11; **II**, p. 34-35, par. 2.33-2.35; p. 39, par. 2.43-2.44; ci-dessus, RL, p. 78, par. 6.06-6.07).

*L'audience, suspendue à 11 h 17, est reprise à 11 h 35*

Monsieur le Président, j'ai fait état tout à l'heure de la thèse libyenne relative aux côtes pertinentes, thèse selon laquelle seules sont pertinentes pour notre délimitation: du côté libyen les côtes de Ras Ajdir à Ras Zarrouk, et du côté maltais les petits segments de côtes qui font face au sud sur l'île de Malte et sur l'île de Gozo ou, si l'on prend les lignes de base droites, la ligne de Delimara Point à Filfla.

Cette théorie, Monsieur le Président, repose sur de graves confusions.

Il est de principe que la délimitation doit, pour reprendre les termes bien connus de la sentence arbitrale franco-britannique, être «en rapport avec les côtes des Parties qui bordent effectivement *[actually abutting on]* le plateau continental» de la région en cause (par. 24). Le concept de «plateau continental que bordent effectivement les côtes des Parties» n'a de toute évidence rien à voir avec la question de savoir si sur tel ou tel segment les côtes des Parties se font face ou non. La notion de côtes se faisant face est en relation avec celle de côtes adjacentes, et les deux notions de côtes se faisant face et de côtes adjacentes ne se situent pas sur le même plan que la notion de côtes qui bordent le plateau à délimiter. Ni la Cour dans aucune des affaires dont elle a été saisie ni le tribunal franco-britannique n'ont jamais découpé les côtes en présence pour ne retenir comme pertinents que les seuls segments des deux côtes qui se font directement face. Dans l'affaire du *Golfe du Maine*, pour m'en tenir à cet exemple récent, la Chambre n'a relevé de «quasi-parallélisme», de «parallélisme presque parfait», entre des segments de la côte des Etats-Unis et des segments de la côte du Canada, que dans une seule des trois parties composant ce qu'elle a appelé l'«aire de délimitation», c'est-à-dire, selon sa définition, «la zone géographique directement concernée par cette délimitation» (*C.I.J. Recueil 1984*, p. 268, par. 28). Il s'agit des segments où les côtes du Massachusetts et de la Nouvelle-Ecosse se font face et se situent dans un «rapport d'opposition frontale» (par. 32, 189, 206, 216). Mais la Chambre n'a pas refusé pour autant de considérer comme «directement concernées par la délimitation» les autres parties de l'«aire de délimitation», celles dans lesquelles les côtes américaines et canadiennes ne présentent plus aucun élément de parallélisme.

Le «tilt» des îles maltaises — qui, selon la Libye, empêcherait la quasi-totalité des côtes maltaises de faire face aux côtes libyennes — n'a en conséquence rien à voir avec notre problème. Ce n'est pas parce que le segment de la ligne de base droite de Malte entre Filfla et Ras il-Wardija est orienté vers le sud-㊷ ouest plutôt que vers le sud, comme il apparaît à la figure 11 de notre dossier, que ce segment ne pourrait se projeter que dans la seule direction sud-ouest ⑭ illustrée par les flèches sur la carte 2 du contre-mémoire libyen. Et ce n'est pas non plus parce qu'elle est orientée vers l'est-sud-est plutôt que vers le sud que la côte maltaise au nord de Delimara Point devrait être récusée. Pour les mêmes raisons, ce n'est pas parce que la côte libyenne à l'est de Ras Zarrouk n'est pas orientée plein nord, face directement à Malte, qu'elle ne serait pas pertinente pour la délimitation entre la Libye et Malte: dans la mesure où les projections à partir de points pris sur cette côte chevauchent des projections maltaises, cette côte à l'est de Ras Zarrouk est au contraire directement pertinente tout autant que celle située à l'ouest de Ras Zarrouk. Or un coup d'œil sur la carte figurant ㊸ sur notre figure 12 permet de constater que des projections issues de certains points de la côte libyenne à l'est de Ras Zarrouk chevauchent des projections effectuées à partir de points maltais.

La confusion commise par la Partie adverse a une racine profonde. La Libye ne conçoit pas les projections maritimes comme s'étendant radialement dans toutes les directions, mais comme s'effectuant frontalement dans le sens — et uniquement dans le sens — de l'orientation de chaque segment de côte, autrement dit perpendiculairement à la direction générale de chaque segment. Entre Ras Ajdir et Ras Zarrouk, la côte libyenne se projetterai frontalement vers le nord, et seulement vers le nord, rencontrant ainsi les projections maltaises à l'ouest du méridien de 16°, mais pas à l'est de celui-ci. Au-delà de Ras Zarrouk la côte libyenne se projetterait également vers le nord, et seulement vers le nord, ne rencontrant ainsi aucune projection maltaise. Quant aux côtes maltaises, elles ne sauraient, à en croire la Libye, que se projeter vers le sud, à partir des rares segments des côtes (ou des lignes de base) de Malte orientés plein ㊷ sud, et qui apparaissent sur la figure 11 de notre dossier, et seules ces projections-là seraient capables de rencontrer des projections libyennes en provenance du segment de la côte libyenne compris entre la frontière tunisienne et Ras Zarrouk; les autres segments des côtes de Malte se projetteraient dans d'autres directions et ne seraient donc pas pertinents pour la délimitation entre Malte et la Libye.

En d'autres termes, c'est chaque fois dans le sens de la perpendiculaire à la direction générale du segment de côte considéré, et dans ce sens seulement, que se réaliserait la projection dudit segment.

Mais, Monsieur le Président, ce n'est pas ainsi que les choses se présentent. Toutes les côtes libyennes, quelle que soit leur orientation, et qu'elles soient à l'est ou à l'ouest de Ras Zarrouk, se projettent en mer dans toutes les directions, et pas seulement frontalement ou perpendiculairement; et toutes les côtes maltaises font de même. Les côtes à prendre en considération sont celles dont les projections se rencontrent et se chevauchent, appelant par là même une délimitation, c'est-à-dire une amputation, une diminution. C'est cela très exactement que dit le passage de l'arrêt de 1982 invoqué par la Libye. Je me permets de le relire ici, tant il est important et clair:

> «pour délimiter le plateau entre les Parties, il n'y a pas à tenir compte de la totalité des côtes de chacune d'elles; tout segment du littoral d'une Partie dont, en raison de sa situation géographique, le prolongement ne pourrait rencontrer celui du littoral de l'autre Partie est à écarter... Les cartes mettent en évidence, sur la côte de chacune des deux Parties, l'existence d'un point au-delà duquel ladite côte ne peut plus avoir de lien avec les côtes de l'autre Partie aux fins de la délimitation des fonds marins. Au-delà de ce point, les fonds marins au large de la côte ne peuvent donc pas constituer une zone de chevauchement des extensions du territoire des deux Parties et, de ce fait, n'ont aucun rôle à jouer dans la délimitation.» (*C.I.J. Recueil 1982*, p. 61-62, par. 75.)

L'expression «zone de chevauchement» des projections des deux côtes, il n'est pas sans intérêt de le noter, se trouvait déjà utilisée dans l'arrêt de 1969 *(an overlapping of the areas)* (*C.I.J. Recueil 1969*, p. 52, par. 99), et elle apparaît à de nombreuses reprises dans l'arrêt de la Chambre dans l'affaire du *Golfe du Maine* (par exemple, par. 115, 195, 209). Le concept de zone de chevauchement peut ainsi être regardé comme une constante de la jurisprudence. Il existe ainsi, on le constate, un lien étroit entre les concepts de projection radiale, de côtes pertinentes, de zones de chevauchement et de délimitation.

Dans l'affaire du *Golfe du Maine* les Etats-Unis avaient illustré leur conception de la projection maritime par une carte (mémoire des Etats-Unis, figure 31 — *C.I.J. Mémoires*, vol. VIII, carte 37). Pour mettre en évidence l'erreur qui était à la racine de cette conception de la projection frontale, le Canada avait établi un croquis sur lequel apparaissaient les conséquences d'une telle approche dans le cas d'un Etat insulaire, indépendamment de tout problème de délimitation (contre-mémoire du Canada, carte 41 A — *C.I.J. Mémoires*, vol. VIII, carte 70); la carte américaine et le croquis canadien figurent dans notre dossier sous les numéros 14 et 15. Au cours de la procédure orale l'un des conseils du Canada, M. Jaenicke, avait illustré la conception des Etats-Unis à l'aide d'une carte que nous avons reproduite dans notre dossier sous le numéro 18; et il avait opposé à cette carte deux autres[1], illustrant la projection radiale; ces deux cartes, présentées par M. Jaenicke pour illustrer la projection radiale et combattre la projection frontale ou perpendiculaire, sont reproduites dans notre dossier sous les numéros 16 et 17. Dans son arrêt la Chambre a procédé à la délimitation du secteur intérieur du golfe du Maine sur la base d'une «division ... de la zone de chevauchement créée par la superposition latérale des projections maritimes des deux Etats» (*C.I.J. Recueil 1984*, p. 331-332, par. 209). Elle a ainsi implicitement rejeté la conception de la projection frontale et perpendiculaire des côtes américaines du fond du golfe préconisée par les Etats-Unis, au profit de la conception canadienne de la projection radiale et omnidirectionnelle.

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[1] Voir *C.I.J. Mémoires, Délimitation de la frontière maritime dans la région du Golfe du Maine*, vol. VIII, cartes 240, 241 et 242. *[Note du Greffe.]*

Si je me suis permis de me référer à ce précédent, c'est parce qu'il permet une comparaison qui ne manque pas d'intérêt dans notre affaire.

La projection de Malte, pas plus que celle des Etats-Unis dans l'affaire précédente, ne s'effectue frontalement du nord au sud, perpendiculairement au segment de la côte maltaise orientée plein sud et en direction des segments de la côte libyenne orientée plein nord. La côte maltaise engendre des extensions maritimes dans toutes les directions, et un problème de délimitation surgit chaque fois que des extensions de Malte rencontrent l'extension de la côte d'un autre Etat: la libye dans certains cas, la Tunisie ou l'Italie dans d'autres.

La tentative libyenne de concevoir la présente affaire comme celle d'une délimitation frontale entre les seuls segments de la côte maltaise orientés plein sud et le seul segment de la côte libyenne orienté plein nord face à Malte s'explique, je le suppose du moins, par une préoccupation de caractère tactique et de portée lointaine. Il s'agit sans doute pour la Libye de confiner la délimitation entre elle et Malte à la zone située à l'ouest du méridien de 16°, c'est-à-dire, approximativement à la hauteur de Ras Zarrouq et de la zone des escarpements. Les cartes sur lesquelles la Libye illustre sa revendication sont
⑨ significatives à cet égard. Je pense par exemple à la carte 17 du mémoire libyen
㉘㉙㉚ ou aux cartes 11, 12 et 13 de la réplique libyenne; cette dernière est reproduite sur la carte 13 de notre dossier. La vision que la Libye cherche à accréditer, la manière dont elle souhaiterait que la Cour conçoive le problème ressortent clairement de ces cartes. Comme la Cour le constatera, ces cartes arrêtent la revendication de la délimitation à la hauteur du méridien de 16°. La délimitation proposée par la Libye ne tient pas compte de la côte libyenne à l'est de Ras Zarrouq, bien que la projection de certains points de cette côte — les points «i» et «j» — se chevauche avec les projections de la côte maltaise, ainsi qu'il
㊸ apparaît clairement sur notre figure 12. La délimitation proposée par la Libye ne tient pas compte non plus du fait — qui saute aux yeux sur cette même figure 12 — que la projection de tous les points maltais s'effectue bien au-delà du seizième degré de longitude, auquel la Libye prétend la bloquer.

Monsieur le Président, Messieurs les juges, Malte ne saurait accepter que le problème soumis à la Cour soit ainsi amputé d'une partie importante de sa substance. De l'avis de Malte, la mission de la Cour est de répondre aux questions posées dans le compromis sur toute l'étendue de la zone de chevauchement des projections des côtes des deux Parties. Cette zone de chevauchement s'étend largement à l'est du méridien de 16° de longitude. Malte ne saurait accepter que sous le couvert d'une définition arbitrairement réduite des côtes pertinentes et de l'aire de délimitation, il lui soit infligé une mutilation injustifiée de ses droits de plateau continental en direction de l'est.

L'objectif libyen apparaît ainsi une fois de plus en pleine lumière: réduire le plateau continental de Malte à la quasi-insignifiance.

La Cour apportera à cette prétention, nous en sommes confiants, la réponse qu'elle mérite.

Les observations que je viens de présenter conduisent à une autre constatation encore: la longueur de chacune des côtes mesurée en kilomètres n'a rien à voir avec la création d'une zone de chevauchement et la nécessité d'une délimitation. C'est la configuration des côtes, dont la longueur ne constitue qu'un élément parmi d'autres, qui crée les points de base aussi bien sur la longue côte libyenne que sur la petite côte maltaise, points de base d'où partent les projections utiles engendrant les zones de chevauchement, et non pas leur longueur en tant que telle et *per se*.

J'en ai ainsi terminé, Monsieur le Président, de ces longs développements relatifs au principe de distance.

## V. L'ÉQUIDISTANCE

Monsieur le Président, Messieurs les juges, l'analyse des thèmes autour desquels se cristallisent les différences majeures séparant les Parties ne saurait être complète sans que soit abordé ce qui constitue sans nul doute l'une des questions les plus disputées dans notre affaire: je veux parler, la Cour l'aura deviné, de la question de l'équidistance.

Une remarque préliminaire, d'abord.

Dans le chapitre introductif, et puis à nouveau dans le dernier paragraphe du chapitre de conclusion de sa réplique, la Libye écrit que c'est l'«insistance» de Malte en faveur d'une délimitation fondée sur l'équidistance qui constitue le principal obstacle à une solution équitable (ci-dessus, RL, p. 3, par. 8, et p. 99, par. 8.17).

Bien sûr, Monsieur le Président, si Malte ne réclamait pas une ligne médiane et s'inclinait devant la revendication libyenne, le différend serait réglé. Comment la Libye réagirait-elle si nous venions dire à la Cour que c'est l'insistance mise par la Libye à réclamer une frontière le long de la *Rift Zone* qui entretient le conflit et met obstacle à une solution équitable?

Si j'ai soulevé cette question, en soi mineure, c'est parce qu'elle illustre le manque de mesure et de modération qui caractérise la manière dont la Partie adverse aborde le problème de l'équidistance. Dès qu'il est question de l'équidistance, les écrits adverses quittent le ton de la critique sereine pour se réfugier dans le procès d'intention.

C'est en effet contre une thèse maltaise imaginaire — taillée sur mesure pour faciliter la critique — que la Libye mène l'attaque. Nous sommes accusés bien sûr, d'ériger l'équidistance en «principe absolu» et d'y voir une règle de «caractère obligatoire». Mais nous sommes accusés surtout de regarder l'équidistance comme «synonyme de résultat équitable», ce qui nous permettrait, à en croire la Libye, de demander à la Cour une délimitation équidistante sur la foi de la seule «vertu abstraite» de cette méthode et sans nous être assurés au préalable de l'équité de cette délimitation au regard des circonstances concrètes de l'affaire; bref, par notre «adhésion dogmatique» à l'équidistance nous chercherions à «contourner les faits», à nous évader en quelque sorte des données spécifiques de la situation (**II**, CML, p. 102, par. 5.01; p. 103, par. 5.05; p. 104, par. 5.09; p. 107, par. 5.18; p. 112, par. 5.33; ci-dessus, RL, p. 25, par. 3.17; p. 33, par. 4.01; p. 48, par. 4.43; p. 50, par. 4.50; p. 53, par. 4.55-4.56; p. 55, par. 5.05; p. 95-96, par. 8.07; p. 97, par. 8.10-8.12).

Tout ceci, nous l'avons déjà souligné, mais il me faut le répéter, dénature complètement notre pensée (ci-dessus, RM, p. 53, par. 101). Nous n'ignorons rien de l'évolution du droit international à ce sujet. Nous savons que l'évolution qui a conduit de l'article 6 de la convention de 1958 à l'article 83 de celle de 1982 reflète, comme l'a relevé un membre de la Cour dans l'affaire *Tunisie/Libye*, une certaine tendance à diminuer dans le cadre conventionnel *(tone down)* le rôle de l'équidistance (*C.I.J. Recueil 1982*, opinion individuelle de M. Jiménez de Aréchaga, p. 109, par. 35). Nous ne considérons pas que l'équidistance constitue en elle-même la méthode de délimitation «imposée par le droit», et nous ne regardons pas l'équidistance comme «synonyme de résultat équitable». Nous sommes pleinement conscients, faut-il le redire, pour reprendre les termes de l'arrêt sur le *Golfe du Maine*, que l'équidistance «n'est pas ... devenue une règle du droit international, une norme découlant logiquement d'un principe juridiquement obligatoire du droit international coutumier» (*C.I.J. Recueil 1984*, p. 297, par. 107). L'analyse que nous avons proposée du processus de délimitation est dépourvue, je l'espère, de toute ambiguïté: c'est seulement en tant que point de départ provisoire que la prise en considération de l'équidistance s'impose en vertu du titre juridique au plateau continental. Il n'y a pas synonymie entre équidistance et solution équitable, et la délimitation définitive ne sera équidistante que dans la mesure où l'équidistance apparaîtra, à la lumière des circonstances concrètes de l'affaire, comme conduisant à un résultat équitable et raisonnable. J'espère que cela mettra fin à ce procès d'intention.

Je voudrais, avec votre permission, Monsieur le Président, m'arrêter quelques instants sur l'équidistance comme point de départ de l'opération de délimitation. Après quoi je me propose d'examiner les rapports entre équidistance et équité tant sur un plan général qu'au regard des données spécifiques de la présente affaire.

### *L'équidistance comme point de départ de l'opération de délimitation*

Comme j'espère être parvenu à en faire la démonstration, l'opération de délimitation ne peut pas se réduire à la détermination d'une frontière équitable en partant des seules circonstances de fait de la situation. A moins d'envisager une décision *ex aequo et bono*, l'équité ne peut pas s'apprécier dans le vide; l'équité doit se vérifier par rapport à une ligne donnée, fondée sur un élément objectif, en rapport avec le concept juridique de plateau continental. Il est indispensable, si je puis me permettre cette expression, de commencer par quelque chose, autrement dit de disposer d'un point d'amarrage qui empêche l'opération de délimitation de dériver vers le subjectif et l'arbitraire.

C'est cela, et rien d'autre, que nous avons voulu exprimer en parlant de «point de départ», de «premier pas» ou de «délimitation primaire».

De l'avis de Malte, la méthode appropriée pour servir de méthode de référence est celle de l'équidistance. De toutes les méthodes, c'est celle qui permet le mieux d'intégrer les deux composantes du titre juridique de l'Etat sur le plateau continental, à savoir les côtes et la distance. De toutes les méthodes c'est celle qui répond le mieux aux impératifs de «neutralité» et de «géométrie» qui — l'arrêt du *Golfe du Maine* vient de le souligner — caractérisent de plus en plus les délimitations maritimes dans le droit de la mer contemporain (*C.I.J. Recueil 1984*, p. 327, par. 194, et p. 329, par. 199).

«Le choix de la méthode à utiliser est essentiellement fonction de la géographie»; la méthode à retenir doit se prêter à être utilisée «sur la toile de fond de la géographie», a déclaré la Chambre dans l'affaire du *Golfe du Maine*, en précisant que «par géographie, il faut entendre ... essentiellement la géographie des côtes» (*ibid.*, p. 301, par. 119; p. 327, par. 195, et p. 333-334, par. 216). Comment douter que la méthode de l'équidistance — qu'elle conduise à une ligne d'équidistance latérale ou à une ligne médiane entre côtes se faisant face — réponde pleinement à cette exigence? La nature même de cette méthode la fait reposer sur la configuration côtière. Il s'agit, comme la Cour l'a indiqué en 1982 dans les termes les plus clairs, d'une méthode «où la ligne de délimitation est directement fonction de points sur les côtes en cause» (*C.I.J. Recueil 1982*,

p. 62, par. 76) et qui, dit toujours la Cour, «a l'avantage — peut-être aussi l'inconvénient — de reproduire presque toutes les irrégularités des côtes prises comme base» (*ibid.*, p. 88, par. 126).

Il est difficile, dans ces conditions, de comprendre l'argument libyen selon lequel la méthode et l'équidistance ne serait pas susceptible, par sa nature même de refléter la géographie côtière (ci-dessus, RL, p. 152, par. 7.04). S'il est *un* mérite que tous s'accordent à reconnaître à l'équidistance, c'est bien celui de refléter les côtes en présence.

Il est exact en revanche que la méthode de l'équidistance ne reflète pas les circonstances de caractère non géographique, telles la géologie et la géomorphologie des fonds marins ou la conduite des Parties, et qu'elle ne tient pas compte de la superficie relative des deux Etats et de la longueur comparée de leurs côtes (**I**, ML, p. 53, par. 4.24; p. 124, par. 7.11; **II**, CML, p. 23, par. 2.04; p. 151-152, par. 7.04-7.05).

Mais ce fait, invoqué par la Libye, ne saurait disqualifier l'équidistance comme méthode de premier pas, puisqu'elle reflète la configuration des côtes, et que c'est la configuration des côtes qui, selon la jurisprudence, est le seul facteur qu'il faille mettre en rapport avec la distance pour établir le titre juridique de l'Etat au plateau continental avant de procéder à la vérification du résultat. «Méthode purement cartographique», s'écrie la Libye pour critiquer l'équidistance. Mais c'est là, très précisément, la raison pour laquelle cette méthode «géométrique», dont l'utilisation se déroule «sur la toile de fond de la géographie», exprime le fondement juridique du titre des Etats côtiers au plateau continental. La Libye ne s'est-elle pas rendue compte qu'en proférant ce qui est à ses yeux une accusation, elle décernait à la méthode de l'équidistance ses lettres de noblesse?

J'espère ainsi avoir établi que la méthode de l'équidistance intègre la composante côtière du fondement juridique du titre au plateau continental. Incorpore-t-elle également la composante spatiale de ce principe? Là encore, la réponse affirmative me paraît hors de doute.

Par définition même, est-il nécessaire de le répéter? la méthode de l'équidistance consiste à tracer une ligne dont chaque point est à égale distance des points les plus proches sur les lignes de base de la mer territoriale des deux pays. Lorsque les espaces sous-marins sur lesquels les deux pays ont un titre juridique se chevauchent, faute de distance suffisante entre les deux côtes, la méthode de l'équidistance ampute la projection potentielle de chacun des deux Etats d'une distance identique et permet ainsi à chacun des deux Etats d'exercer ses droits de plateau continental à une aussi grande distance de sa côte que l'autorise le respect des droits d'égale valeur de l'autre Etat. Du même coup se trouvent sauvegardés le principe du non-empiétement et celui de l'égalité des Etats.

Tel est, en tout cas, l'avantage que l'on peut attendre de la méthode *prima facie*. Car il est évidemment possible que, dans certains cas particuliers, le résultat apparaisse inéquitable: une particularité mineure peut, par exemple, faire dévier la ligne à une trop grande proximité de l'une des côtes; d'autres facteurs propres à la situation concrète de l'espèce peuvent également conduire à ne pas considérer le résultat comme raisonnable. Mais c'est là, précisément, le rôle assigné à la seconde phase de l'opération, à savoir la vérification de l'équité du résultat, suivie le cas échéant des corrections nécessaires. Equidistance n'est pas forcément synonyme d'équité; et ce dont il est question, pour le moment, ce n'est rien de plus que de prendre la ligne d'équidistance en considération provisoirement, à titre de premier pas, parce qu'elle intègre le double paramètre de «côtes» et de «distance», et qu'elle reflète le fondement juridique du titre au plateau continental. On ne saurait nier, me semble-t-il, que l'apparition du principe de distance comme fondement principal du titre juridique de l'Etat côtier au plateau continental confère un intérêt nouveau à l'équidistance en tant que méthode de délimitation à envisager comme point de départ.

L'équidistance reflète ainsi le binôme côtes/distance: cette raison d'ordre purement juridique serait peut-être suffisante pour exiger que ce soit la ligne d'équidistance qui constitue le point de départ du processus de délimitation.

A cette première raison s'en ajoute une autre, qui milite dans le même sens: l'extrême simplicité et commodité de cette méthode, qu'admet d'ailleurs la Partie adverse (**II**, CML, p. 135, note 1). On peut dire de la méthode de l'équidistance ce que Boggs disait de celle des enveloppes des arcs de cercle: elle est d'un maniement aussi facile que celle du papier de tournesol pour déterminer si une solution est acide ou alcaline (*AJIL*, vol. 45, 1951, p. 248). «Aucune autre méthode de délimitation, a déclaré la Cour elle-même, ne combine au même degré les avantages de la commodité pratique et de la certitude dans l'application.» Son «emploi, a-t-elle ajouté, est indiqué dans un très grand nombre de cas» (*C.I.J. Recueil 1969*, p. 23, par. 22-23). Le tribunal franco-britannique a noté que le bien-fondé de cette observation de la Cour

> «est certainement confirmé par la pratique des Etats; celle-ci montre que jusqu'à ce jour un nombre considérable de délimitations de plateaux continentaux ont été effectuées par l'application soit de la méthode de l'équidistance, soit, assez fréquemment, par quelque variante de cette méthode» (sentence arbitrale, par. 85).

La Chambre de la Cour vient également de relever la «simplicité» de cette méthode (*C.I.J. Recueil 1984*, p. 327, par. 195), qui, a-t-elle précisé, a rendu «des services indéniables par son application dans bien des situations concrètes» (p. 297, par. 107). Les explications fournies à la Cour par mon ami Elihu Lauterpacht corroborent pleinement ces vues. Mais alors, Monsieur le Président, je me permets de poser une question: si l'emploi de l'équidistance apparaît si souvent «indiqué» pour le résultat définitif, ne l'est-il *a fortiori* lorsqu'il s'agit seulement de déterminer une ligne de référence appelée à subir l'épreuve du contrôle de l'équité?

Ces deux raisons majeures de prendre l'équidistance comme point de départ, à savoir sa relation avec le binôme côtes/distance et sa simplicité et commodité d'emploi, se prolongent par une troisième considération, mise en lumière par l'arrêt du *Golfe du Maine*. Au sujet de la méthode consistant à diviser par parts égales les zones de convergence et de chevauchement des projections maritimes des deux Etats, l'arrêt sur le *Golfe du Maine* déclare que son «équité est de longue date considérée comme un caractère rejoignant la simplicité» (*C.I.J. Recueil 1984*, p. 327, par. 195); cette méthode, poursuit l'arrêt, met en œuvre un «critère dont le caractère équitable est inhérent à son simple énoncé» (p. 328, par. 197) et peut être tenue pour équitable «de prime abord au moins» (p. 300, par. 115), c'est-à-dire à titre de point de départ.

On comprend, dans ces conditions, que lorsque deux gouvernements cherchent à se délimiter par la voie conventionnelle, ils commencent presque toujours par envisager une ligne d'équidistance, soit pour la retenir définitivement, soit pour l'ajuster ou même l'écarter à la fin du processus. De cette pratique de la négociation, les témoignages les plus autorisés ne manquent pas.

En 1958 déjà, au cours de la Conférence de Genève, le Commander Kennedy avait indiqué que, même s'il existe dans une situation donnée des circonstances spéciales justifiant une ligne autre que l'équidistance, la ligne médiane «constituerait, même alors, le meilleur point de départ pour des négociations» *(woul* *still provide the best starting point for negotiations)* (*Première conférence des Nations Unies sur le droit de la mer, Documents officiels*, vol. VI, p. 112; trad. angl., p. 93).

Plus significative que cette prise de position intervenue dans le contexte juridique de la règle équidistance-circonstances spéciales de la convention de 1958 est l'analyse faite récemment de la pratique française par M. Guillaume: cette analyse est d'autant plus précieuse que, selon les indications de l'auteur — orfèvre en la matière, s'il en est —, la France cherche à négocier avec ses partenaires, sauf exceptions particulières, des délimitations fondées sur le droit, et non pas seulement sur des raisons d'opportunité, politiques ou autres. Et que nous dit M. Guillaume? Je lis:

> «La méthode de l'équidistance doit toujours constituer un point de départ dans la recherche de l'équité.. Elle constitue un excellent point de départ permettant de tracer une première délimitation objective grâce à laquelle les négociations pourront partir d'un élément concret.» (*Op. cit.*, p. 281-282.)

Ce qui n'empêche pas, bien sûr, M. Guillaume de noter que dans certains cas l'équidistance s'avérera inéquitable et qu'il conviendra donc de la corriger ou de l'écarter.

Ce témoignage du directeur des affaires juridiques du ministère français des relations extérieures est d'autant plus intéressant, me semble-t-il, que la France a fait partie à la troisième conférence de ce qu'un membre de la Cour a appelé le «courant de pensée» *(school of thought)* des «principes équitables» par opposition à celui de l'équidistance, et qu'elle a figuré parmi les Etats qui ont proposé au groupe de travail n° 7 le texte dit NG 7/10, auquel la Libye se réfère dans ses écritures (**II**, CML, p. 111, note 1, et annexe documentaire n° 33) (cf. *C.I.J. Recueil 1982*, opinion dissidente de M. Oda, p. 223-224).

Ce qui est vrai des délimitations conventionnelles l'est tout autant des délimitations par voie judiciaire ou arbitrale.

Dans l'arrêt de 1969, on lit que:

> «la Cour doit rechercher comment une délimitation de plateau continental peut être assurée lorsque le principe de l'équidistance ne donne ... pas une solution équitable» (*C.I.J. Recueil 1969*, p. 50, par. 92).

Comment savoir que l'équidistance «ne donne pas une solution équitable» si on ne commence pas, à tout le moins, par l'essayer? C'est de toute évidence ce que la Cour a fait dans l'affaire du *Plateau continental de la mer du Nord*, et c'est seulement parce que le résultat lui est apparu comme inéquitable, compte tenu de la configuration particulière des côtes en cause, qu'elle s'est mise à la recherche d'une autre solution.

La sentence arbitrale de 1977 évoque de son côté

> «la question de savoir si certaines caractéristiques géographiques ont pour objet de rendre «injustifiée» ou «inéquitable» une délimitation conforme au principe de l'équidistance...» (par. 240).

Et c'est effectivement à partir de la ligne d'équidistance et par rapport à cette ligne qu'ont été appréciés par le tribunal arbitral les effets disproportionnés de la configuration géographique particulière des Sorlingues (par. 243).

Sans doute l'arrêt de 1982 paraît-il écarter l'équidistance «as a first step» (*C.I.J. Recueil 1982*, p. 79, par. 110), mais il ne faut pas oublier que dans cette affaire les deux Parties s'étaient prononcées, l'une et l'autre, contre l'application de cette méthode: «la Cour, est-il dit dans l'arrêt, doit tenir compte de cette ferme position des Parties» *(C.I.J. Recueil 1982)*. La suite de l'arrêt montre au surplus que, au moins dans le second secteur, la méthode de l'équidistance a été prise en considération par la Cour (*ibid.*, p. 88, par. 126).

Quant à l'arrêt de la Chambre dans l'affaire du *Golfe du Maine*, il déclare certes qu'il n'y a pas de méthode «dont on puisse dire absolument qu'elle doit être prise en considération en priorité» (*C.I.J. Recueil 1984*, p. 315, par. 163). Cela ne l'empêche pas de relever que «dans nombre de cas» on a pris «certaines méthodes» en considération «en priorité par rapport à d'autres» (*ibid.*, par. 162). Cela ne l'empêche surtout pas, au moment où il s'apprête à proposer sa solution au litige, de déclarer que

> «son choix de base ne peut que se porter sur le critère à propos duquel l'équité est de longue date considérée comme un caractère rejoignant la simplicité: à savoir le critère qui consiste à viser en principe — en tenant compte des circonstances spéciales de l'espèce — à une division par parts égales des zones de convergence et de chevauchement des projections marines des côtes des Etats entre lesquels la délimitation est recherchée» (*ibid.*, p. 327, par. 195; dans le même sens, p. 328, par. 197).

C'est effectivement en partant de l'équidistance que la Chambre a procédé à la délimitation dans deux des trois secteurs qu'elle a distingués dans la région à délimiter, quitte à y apporter ensuite les corrections qu'elle a jugées équitables compte tenu des circonstances de l'espèce (*ibid.*, p. 331-332, par. 209-210, et p. 333-337, par. 215-223).

Je voudrais enfin pour terminer faire état du témoignage d'un membre même de la Cour, selon lequel:

> «Il va de soi que, dans toute affaire de délimitation, le juge envisage la ligne d'équidistance, même si aucune des Parties n'en a demandé le tracé.» (*C.I.J. Recueil 1982*, opinion individuelle de M. Jiménez de Aréchaga, p. 105, par. 18.)

Monsieur le Président, la situation, on le constate, est des plus claires.

La solution préconisée par Malte commence par prendre en considération, à titre provisoire, la méthode de l'équidistance, qui incorpore les concepts de côtes et de distance dont la combinaison constitue le fondement du titre juridique de l'Etat côtier au plateau continental adjacent à ses côtes.

La solution préconisée par la Libye court-circuite, au contraire, ce double paramètre.

Cela est évident pour la composante spatiale, à laquelle la Libye refuse tout simplement toute pertinence dans la délimitation.

Mais c'est vrai également pour la composante côtière, à laquelle la Libye fait certes semblant d'accorder une place de choix, mais qui ne joue aucun rôle effectif dans la délimitation qu'elle préconise: avec des côtes maltaises et des côtes libyennes tout à fait différentes de ce qu'elles sont, la revendication libyenne d'une délimitation le long de la *Rift Zone* et de la zone des escarpements ne bougerait pas d'un pouce.

En prenant, comme elle le fait, le contre-pied de l'équidistance en tant que point de départ de l'opération de délimitation découlant du principe de distance dans sa double composante, la Libye ignore en définitive la règle des 200 milles, elle néglige la conception du plateau continental telle que l'exprime l'article 76, elle ne tient aucun compte de l'apparition du concept de la zone économique exclusive — en un mot elle méconnaît l'environnement juridique du droit de la mer contemporain. La thèse libyenne est une survivance du passé.

Après ces observations sur la prise en considération de l'équidistance comme point de départ de l'opération de délimitation, je voudrais maintenant me tourner pour finir, avec votre permission, Monsieur le Président, vers l'importante et délicate question des rapports entre l'équidistance et l'équité dans notre affaire.

### *Equidistance et solution équitable*

Non contente d'imputer à Malte la thèse purement imaginaire selon laquelle l'équidistance serait toujours équitable, la Partie adverse en vient à laisser entendre que l'équidistance ne serait jamais équitable. Oh, je sais bien que la Libye n'a pas dit cela *expressis verbis* et qu'elle a même pris soin de noter dans ses écritures que dans certaines circonstances l'équidistance peut se révéler comme une solution équitable! Il est clair pourtant que les critiques que la Libye a faites à l'équidistance ne restent pas sur le terrain des circonstances concrètes de la présente affaire, mais s'adressent *in abstracto* à cette méthode en tant que telle — ce qui, je le note en passant, est assez piquant lorsqu'on songe à l'âpreté avec laquelle la Libye nous a reproché notre prétendue «abstraction».

Ce n'est en effet pas seulement le caractère équitable de la ligne médiane dans le cas concret de notre affaire qui fait l'objet d'une offensive de grande envergure, mais le caractère équitable de toute ligne d'équidistance, autrement dit de la méthode de l'équidistance en soi. Sous la plume de nos adversaires, j'exagère à peine, l'équidistance devient, si j'ose dire, la brebis galeuse du droit de la délimitation du plateau continental, dont toute l'évolution du droit international tend à s'écarter («trend away from equidistance»). Pour un peu le vocable même d'équidistance deviendrait un mot honteux, que l'on n'oserait plus utiliser qu'avec d'infinies précautions de langage.

Si les critiques formulées par la Libye contre la méthode d'équidistance en soi étaient justifiées, l'équidistance ne devrait pour ainsi dire jamais être retenue comme base d'une délimitation de plateau continental. Et pourtant, combien de délimitations conventionnelles ne reposent-elles pas sur l'équidistance, même lorsqu'un petit Etat insulaire fait face à un grand Etat continental? Et comment oublier que la jurisprudence n'a pas seulement eu à cœur de noter je ne sais combien de fois que l'équidistance peut constituer une solution équitable (cf. **II**, CMM, p. 82, par. 174), mais qu'elle a effectivement eu recours à cette méthode, ou à une variante de cette méthode?

Pour comprendre l'attitude de la jurisprudence à l'égard du caractère équitable ou non de la méthode de l'équidistance, il ne faut pas perdre de vue la distinction terminologique et conceptuelle entre les deux variantes de la ligne d'équidistance sur laquelle l'arrêt du *Golfe du Maine* vient d'attirer une fois de plus l'attention: celle entre une ligne d'équidistance latérale entre deux côtes limitrophes et une ligne d'équidistance médiane entre deux côtes se faisant face (*C.I.J. Recueil 1984*, p. 323-324, par. 186-187). Face à une jurisprudence unanime sur ce point, et confirmée par l'arrêt sur le *Golfe du Maine*, l'affirmation libyenne d'une «disparition progressive de toute distinction entre Etats «se faisant face» ou «adjacents» (**II**, CML, p. 112-117, par. 5.34-5.48) prend figure de *wishful thinking*, ainsi que nous l'avons montré dans notre réplique (ci-dessus, RM, p. 63-68, par. 120-129, et p. 91-93, par. 182-189).

Cette distinction avait été déjà posée par la Cour dans son arrêt de 1969 (*C.I.J. Recueil 1969*, p. 17, par. 6, et p. 36, par. 57); la Cour avait montré — j'ai à peine besoin de le rappeler — que les difficultés soulevées par une ligne latérale entre côtes limitrophes ne se retrouvent pas dans le cas d'une ligne médiane entre côtes se faisant face. Le texte des paragraphes 6 et 57 de l'arrêt de 1969 est si connu que je ne me permettrai pas d'en donner lecture à nouveau ici.

La sentence arbitrale franco-britannique de 1977 avait également tenu à souligner la nécessité d'une rigueur terminologique sur ce point (par. 96, note 1), et elle avait qualifié d'«essentielle» la distinction posée par la Cour (par. 86). Selon le tribunal arbitral:

> «pour établir si la méthode de l'équidistance permet d'aboutir à une solution équitable, il faut tenir compte de la différence qui existe entre une limite «latérale» entre Etats «limitrophes» et une ligne «médiane» entre Etats «se faisant face» (par. 97);
>
> «dans le cas d'Etats «se faisant face», une ligne médiane aura pour effet normal une délimitation qui sera dans l'ensemble équitable»,

ce qui n'est pas toujours le cas pour une ligne d'équidistance latérale (par. 95; dans le même sens, par. 235). Comme l'observe M. Bowett, le tribunal arbitral a recouru d'emblée à la ligne médiane dans les régions non controversées de l'arbitrage franco-britannique et, dans les deux régions controversées, il a modifié plutôt que rejeté cette méthode (*op. cit.*, p. 217; *BYBIL*, *loc. cit.*, p. 14).

L'arrêt *Tunisie/Libye* de 1982 avait lui aussi confirmé que dans le cas de côtes se faisant face «la position d'une ligne d'équidistance pèse plus qu'elle ne ferait normalement dans l'appréciation globale des considérations d'équité» (*C.I.J. Recueil 1982*, p. 88, par. 126).

C'est à cette distinction solidement établie que se réfère avec insistance l'arrêt du *Golfe du Maine*. Même dans le secteur intérieur du golfe, où la situation est pourtant, selon la Chambre, celle d'un rapport d'adjacence latérale (*C.I.J. Recueil 1984*, p. 324-325, par. 188-189), la Chambre a considéré que «l'idée de tracer une ligne d'équidistance latérale» était «parfaitement concevable» (par. 188); et si elle a corrigé en fin de compte cette ligne en raison des circonstances propres à l'espèce, elle l'a fait au profit d'une ligne plus favorable pour le Canada que la ligne d'équidistance que ce dernier revendiquait. Ayant ainsi admis qu'une ligne d'équidistance latérale entre côtes limitrophes à l'intérieur du golfe était à tout le moins concevable, la Chambre allait tout naturellement, à plus forte raison, souligner avec plus de force encore le caractère normalement équitable d'une ligne médiane dans le second secteur, celui où se présentait entre les côtes des Parties un rapport caractérisé d'opposition frontale. Pour l'application du «critère équitable de la division, autant que possible par parts égales, des zones de chevauchement des projections maritimes des deux Etats», a déclaré la Chambre, «on ne saurait ... imaginer de meilleure occasion ... que l'existence de deux côtes opposées pratiquement parallèles, entre lesquelles il s'agit d'établir à mi-chemin une ligne de délimitation médiane» (*C.I.J. Recueil 1984*, p. 334, par. 217). La prise en considération des circonstances pertinentes, et notamment de l'existence d'une frontière terrestre dans un coin particulier du golfe, conduira la Chambre à corriger la ligne médiane plutôt qu'à la rejeter.

On saisit, dans ces conditions, à quel point est excessive et injustifiée la critique, faite par la Libye, à la méthode de l'équidistance en général, selon laquelle cette méthode conduirait à répartir le plateau continental entre les Etats en cause dans la proportion de 1:1 (ci-dessus, RL, p. 80-81, par. 6.14-6.17). Faut-il rappeler, une fois de plus, que dans notre affaire, avec une ligne médiane, la Libye aurait une zone de plateau continental beaucoup plus étendue que Malte (cf. **I**, MM, p. 36, par. 117; **II**, CMM, p. 107, par. 244)? Diviser également les zones de chevauchement des projections maritimes des deux côtes ne signifie pas diviser également le plateau continental entre les deux pays. Les deux notions sont différentes.

Pas davantage ne saurait-on accorder d'intérêt au témoignage du déclin de l'équidistance en général que la Partie adverse croit trouver dans l'absence de référence à l'équidistance dans le texte définitif de l'article 83 de la convention sur le droit de la mer (**II**, CML, p. 112, par. 5.32-5.33). Cette absence ne revêt nullement la signification de vaste envergure que la Libye voudrait lui attacher. Il ne faut pas oublier que la méthode de l'équidistance est la seule à avoir bénéficié d'une mention expresse dans certains des textes de négociation. Cette mention a certes disparu de la rédaction définitive de l'article 83, mais pour une raison très particulière : c'est, comme je l'ai rappelé précédemment, parce que ce texte de compromis, rédigé en hâte à la fin de la conférence, a éliminé en même temps les deux concepts disputés au cours de la longue lutte qui s'était déroulée au sein de la conférence et du groupe de travail : les « principes équitables » ont disparu dans la tourmente finale en même temps que l'« équidistance », et seule a survécu la mention neutre et, dans une certaine mesure, inoffensive de la finalité d'une « solution équitable ». On ne saurait tirer du silence gardé par l'article 83 au sujet de l'équidistance la conclusion dévastatrice pour cette méthode que la Libye souhaiterait en tirer — pas plus d'ailleurs, je m'empresse de le noter, que l'on ne serait justifié à inférer du silence de l'article 83 sur les « principes équitables » pour soutenir que ces derniers ont disparu du droit de la délimitation du plateau continental.

Par l'excès même de ses critiques la Libye s'est engagée, je le crains, dans ce que j'ai cru pouvoir appeler dans l'affaire du *Golfe du Maine*, où l'une des Parties avait recouru à la même tactique de critique sans mesure de l'équidistance, une croisade contre l'équidistance, présentée comme le mal absolu (*C.I.J. Mémoires*, vol. VII, p. 32).

Monsieur le Président, faut-il répéter que l'équidistance n'a certainement pas valeur universelle; elle n'est certainement pas toujours équitable. Mais de cela on ne saurait déduire que l'équidistance n'a pratiquement pas de valeur, qu'elle n'est presque jamais équitable. En dépit des réserves qu'elle a exprimées à son égard, la Chambre vient de réaffirmer, dans l'affaire du *Golfe du Maine*, que l'équidistance constitue « une méthode pratique utilisable aux fins de la délimitation » (*C.I.J. Recueil 1984*, p. 297, par. 106). Le fait que son emploi ne soit pas juridiquement obligatoire — et nous en convenons, du côté maltais — ne signifie pas, a précisé la Chambre, que son emploi soit juridiquement interdit : « il ne faut pas confondre, déclare la Chambre, l'absence d'une obligation de faire avec une obligation de ne pas faire » (p. 321, par. 180). Ce n'est pas parce que les partisans des « principes équitables » se sont affrontés à ceux de l'« équidistance » au sein de la troisième conférence que l'équidistance devrait être conçue comme l'opposé des « principes équitables », et réciproquement. Equidistance et équité ne sont pas plus antinomiques que synonymes : l'équidistance peut être équitable, elle peut être inéquitable. Evidences d'une totale banalité, penseront sans doute la plupart des membres de la Cour. Certes, et j'aurais hésité à les rappeler devant la Cour si toute l'argumentation de la Libye dans notre affaire ne se déroulait pas sur la toile de fond d'une espèce d'opposition quasi ontologique à l'équidistance.

Les rapports entre l'équidistance et l'équité ont été résumés par la Cour dans une formule d'une puissante simplicité à laquelle il faut toujours revenir et dont je voudrais demander à la Cour la permission de donner une fois encore lecture : « l'équidistance est applicable si elle conduit à une solution équitable; sinon il y a lieu d'avoir recours à d'autres méthodes » (*C.I.J. Recueil 1982*, p. 79, par. 109). Dans cette formule se trouve affirmée l'idée que l'équidistance constitue la méthode de référence par rapport à laquelle l'équité est appréciée. Dans cette formule se trouve également énoncé, avec le sens de l'équilibre et de la mesure qui fait les grands *dicta* juridiques, qu'équidistance et équité peuvent coïncider sans coïncider nécessairement, peuvent diverger sans diverger nécessairement.

Il apparaît ainsi que l'opposition entre équidistance et équité est un faux problème. Comme l'a dit M. Guillaume, dans la communication déjà mentionnée:

> «*il n'existe pas*, semble-t-il, *un dilemme équidistance/équité*, mais un objectif, la recherche d'une solution équitable, qui doit être atteint en faisant application de la règle juridique selon laquelle l'équidistance doit être corrigée en fonction des circonstances spéciales» (*op. cit.*, p. 280). (Les italiques sont de moi.)

Cette prise en considération des circonstances pertinentes destinées à vérifier l'équité du résultat pose bien entendu le problème de l'identification des circonstances dont il convient de tenir compte, car toutes les circonstances ne sont pas pertinentes *en droit*, et c'est le juge ou l'arbitre qui, dans chaque affaire, déterminera celles des circonstances auxquelles il accordera cette qualité. Après quoi surgira le problème de la mise en balance des différentes circonstances que le juge ou l'arbitre aura retenues comme pertinentes. Problème difficile, car rien n'assure *a priori* que les circonstances retenues comme pertinentes en droit militent toutes dans le même sens. Des choix difficiles peuvent s'avérer nécessaires, et c'est là que s'exerce ce que la sentence franco-britannique a appelé le pouvoir d'«appréciation» du juge (par. 70; cf. arrêt du *Golfe du Maine*, *C.I.J. Recueil 1984*, p. 312, par. 156, et p. 325, par. 191).

Il n'est pas nécessaire que j'examine ici ce double problème de l'identification des circonstances pertinentes et de leur poids respectif. Je noterai seulement que les circonstances de caractère géographique — c'est-à-dire celles qui tiennent à la configuration des côtes, aux relations entre les côtes en présence, d'une part, et entre ces côtes et la zone de plateau continental à délimiter, d'autre part — sont à coup sûr pertinentes et qu'elles occupent au sein des autres circonstances pertinentes une place privilégiée. C'est essentiellement, bien que non exclusivement, par rapport aux données de la géographie que l'équité de la ligne d'équidistance prise comme point de départ va devoir s'apprécier.

Cette primauté accordée aux circonstances pertinentes de caractère géographique pour tester l'équité du résultat remonte à fort loin.

Il y a un demi-siècle déjà, Gidel préconisait, pour délimiter la mer territoriale dans ce qu'il appelait les «détroits peu larges» — nous dirions aujourd'hui: entre côtes se faisant face —, le recours à la méthode de la ligne médiane, sauf convention contraire et à moins que des «conditions physiques exceptionnelles» ne conduisent à recourir à une autre méthode et à adopter «tel tracé à déterminer en tenant compte de la nature des lieux» (G. Gidel, *Le droit international public de la mer*, t. III, Paris, 1934, p. 756-757). On reste admiratif devant l'intuition de Gidel et le modernisme de ses vues.

Plus près de nous, et à propos cette fois du plateau continental lui-même, la Commission du droit international élaborait ce qui allait devenir la règle de l'article 6 de la convention de 1958: ligne médiane «à défaut d'accord, et à moins que des circonstances spéciales ne justifient une autre délimitation»; et la Commission précisait dans son commentaire que par «circonstances spéciales» elle entendait «une configuration exceptionnelle de la côte, ou encore la présence d'îles ou de chenaux navigables» (*Annuaire de la CDI*, 1956, vol. II, p. 300).

Cette primauté des circonstances géographiques, établie par Gidel et la Commission, ne s'est pas démentie depuis lors. Le dispositif de l'arrêt de 1969 place au premier rang des facteurs à prendre en considération « la configuration générale des côtes des Parties et la présence de toute caractéristique spéciale ou inhabituelle » (*C.I.J. Recueil 1969*, p. 54, par. 101 D). La sentence arbitrale de 1977 attire dix fois, vingt fois l'attention sur les « circonstances géographiques », qu'elle cite tantôt seules (par exemple, par. 84-85), tantôt avec d'autres en évoquant les circonstances pertinentes « géographiques et autres » (par exemple, par. 69, 93, 194, 232). Dans l'arrêt *Tunisie/Libye* la géographie côtière a également joué un rôle de premier plan qu'il n'est pas nécessaire de rappeler à la Cour (*C.I.J. Recueil 1982*, p. 86, par. 122, et p. 88-89, par. 128). Plus récemment encore, l'arrêt du *Golfe du Maine* énonce que

> « le caractère équitable ou non du résultat de l'opération de délimitation ... pourrait difficilement être apprécié par rapport à des paramètres autres que ceux, dominants, fournis par la géographie physique et politique des lieux » (*C.I.J. Recueil 1984*, p. 340, par. 231).

La géographie côtière, Monsieur le Président, je le note en passant, constitue ainsi un facteur « dominant » dans les deux phases de l'opération de délimitation : au niveau du point de départ, de la ligne de départ provisoire, c'est elle qui suggère l'emploi de la méthode de l'équidistance et détermine le tracé de la ligne d'équidistance de premier pas; au niveau de la délimitation définitive, c'est encore la géographie côtière qui fournit le paramètre de référence dominant pour l'appréciation du caractère équitable, ou non, de la ligne.

L'idée qui se dégage de l'ensemble de la jurisprudence est que le juge entend avant tout vérifier si un accident géographique mineur de l'une des côtes — une île ou un rocher, un saillant isolé de la côte ou un promontoire exceptionnellement long, par exemple — n'a pas pour effet de provoquer une déviation majeure de la ligne d'équidistance, génératrice d'une amputation ou d'un empiétement disproportionnés par rapport à l'importance de l'accident et, par là même, inéquitable.

C'est parce que la configuration des côtes « peut dans certains cas aboutir à des résultats de prime abord *[on the face of them]* extraordinaires, anormaux ou déraisonnables » que la Cour a considéré, en 1969, qu'il faut parfois écarter l'équidistance (*C.I.J. Recueil 1969*, p. 23, par. 24). La Cour parle dans cet arrêt de la nécessité d'« éliminer l'effet exagéré de déviation » que peuvent engendrer des « îlots, des rochers ou des légers saillants de la côte » (*ibid.*, p. 36, par. 57); et elle relève qu'il convient de « remédier à une particularité non essentielle d'où pourrait résulter une injustifiable différence de traitement » (*ibid.*, p. 50, par. 91).

Quelques années plus tard, cette approche est confirmée par la sentence arbitrale franco-britannique : « Le rôle de l'équité est ... de remédier de façon convenable aux effets inéquitables de déviation d'une caractéristique géographique. » (Par. 251.) Il faut éviter, estime le tribunal arbitral, que des « configurations particulières de la côte », des « caractéristiques particulières », des « particularités non essentielles » (sentence, par. 100, 101, 251) ne créent une « distorsion dans le tracé de la limite » (par. 100). Le tribunal évoque « la question de savoir si certaines caractéristiques géographiques ont pour effet de rendre « injustifiée » ou « inéquitable » une délimitation conforme au principe de l'équidistance » (par. 240).

Dans l'affaire du *Golfe du Maine* la Chambre a souligné, dans le sillage et le droit fil de la jurisprudence antérieure, qu'« il ne faut pas se laisser trop facile-ment séduire par les apparences de perfection» de la méthode de l'équidistance en raison, notamment, des

> «inconvénients que peut engendrer une méthode consistant précisément à retenir comme points de base, pour le tracé d'une ligne recherchant une division à égalité d'un certain espace, de toutes petites îles, de rochers inhabités, des hauts-fonds, situés parfois à une distance considérable de la terre ferme» (*C.I.J. Recueil 1984*, p. 330-331, par. 201; cf. aussi p. 327-328, par. 196).

C'est cette considération, entre autres, qui a conduit la Chambre à corriger la ligne d'équidistance de départ dans le secteur intérieur du golfe: «c'est exactement [c'est-à-dire la présence de petites îles, de rochers inhabités, de hauts-fonds] le type d'accident géographique mineur, dit la Chambre, dont ... il convient de faire abstraction...» (*ibid.*, p. 332, par. 210).

C'est là que réside l'élément essentiel, bien que non exclusif, de la prise en considération des circonstances pertinentes: s'assurer que la méthode d'équidistance retenue comme première approche ne provoque pas, en raison d'une configuration géographique particulière et exceptionnelle, une déviation disproportionnée, une distortion déraisonnable. Ce n'est pas toute déviation, même minime, qui sera à corriger parce que génératrice d'inéquité, mais seulement celle qui conduit à une «différence injustifiable de traitement» ou à des résultats «de prime abord extraordinaires, anormaux ou déraisonnables». Des distortions insignifiantes n'appellent aucune correction. Comme j'ai cru pouvoir le dire dans un autre contexte, *de minimis non curat delimitator* (*C.I.J. Mémoires, Délimitation de la frontière maritime dans la région du Golfe du Maine*, vol. VII, p. 34).

On en vient ainsi à apprécier à sa juste valeur ce qui a constitué, si je puis dire, la philosophie de la Commission du droit international, il y a près de trente ans: l'équidistance, mais avec la flexibilité et la souplesse nécessaires pour permettre une solution équitable compte tenu des circonstances particulières de l'espèce. Sur le plan de l'opportunité technique, et non pas sur le plan juridique, le Comité d'experts avait suggéré la solution de la ligne médiane ou de l'équidistance, assortie d'une soupape de sûreté (*Annuaire de la CDI*, 1953, vol. II, p. 79), et, dans le sillage de cette suggestion, la Commission s'était prononcée, sur le plan du droit cette fois, en faveur de l'équidistance assortie d'une certaine élasticité:

> «il doit être prévu [a indiqué la Commission dans son rapport de 1956] qu'on peut s'écarter de la règle lorsqu'une configuration exceptionnelle de la côte ou encore la présence d'îles ou de chenaux navigables l'exigent. Ce cas pourra se présenter assez souvent. La règle adoptée est donc dotée par là d'une certaine souplesse.» (*Annuaire de la CDI*, 1956, vol. II, p. 300.)

Trente ans après, on ne peut manquer d'être frappé par la perspicacité de la Commission et par l'actualité de son approche. A cette époque le principe de distance en était encore à ses tout premiers balbutiements, et c'est surtout la commodité pratique de l'équidistance qui inspirait la Commission. Cette commodité n'a pas disparu, et demeure aussi convaincante aujourd'hui qu'hier. Mais une raison juridique s'ajoute à présent à ce motif pratique de prendre l'équidistance pour point de départ: le principe de distance justifie aujourd'hui juridiquement ce qui n'était encore à cette époque qu'une solution de convenance.

Il est certain, Monsieur le Président, comme vient de le rappeler la Chambre dans l'affaire du *Golfe du Maine*, que la règle combinée «équidistance-circonstances spéciales», dont s'occupait la Commission, est limitée au droit international particulier de la convention de Genève et ne constitue pas une règle du droit international général et coutumier (par. 122-123). J'en suis parfaitement conscient. Il n'en demeure pas moins que, dans leur substance, la règle conventionnelle de la convention de Genève combinant «équidistance-circonstances spéciales» et la règle de droit coutumier dont la Chambre vient de donner une «reformulation» au paragraphe 112 de son arrêt ne sont pas très éloignées l'une de l'autre; l'un des apports jurisprudentiels majeurs de la sentence franco-britannique a précisément été d'unifier, ou de rapprocher du moins, le contenu du droit conventionnel et du droit coutumier en cette matière, en relevant qu'il n'y a pas de véritable différence de fond ou de résultat entre la règle de l'article 6 et la norme générale du droit coutumier (sentence arbitrale, par. 69-70 et 97). Il est peut-être significatif à cet égard que la Chambre elle-même ait eu recours, pour désigner les données concrètes susceptibles de conduire à une correction de la méthode d'équidistance de départ dans le cadre du droit coutumier, au vocable de «circonstances spéciales de l'espèce» emprunté à la terminologie de la Commission du droit international et de la convention de 1958 (par. 195).

Les observations que je viens de faire conduisent à poser à présent la question décisive sur laquelle j'échèverai cet exposé: existe-t-il, dans le cas présent, des circonstances pertinentes qui feraient apparaître le caractère inéquitable de la ligne d'équidistance de départ et nécessiteraient donc sa correction, voire même son abandon?

La géologie et la géomorphologie sous-marines ne sauraient, nous l'avons montré, avoir de poids dans notre affaire, pour des raisons tant scientifiques que juridiques.

D'autres circonstances présentent davantage d'intérêt: la conduite des Parties, les considérations de sécurité au sens large, et d'autres encore. Mes collègues ont eu — et auront — l'occasion de montrer que, loin d'invalider la ligne d'équidistance, ces circonstances contribuent au contraire à en confirmer l'équité.

Je m'en tiendrai, pour ma part, aux circonstances de caractère géographique, dont le caractère «dominant» est affirmé, comme nous l'avons vu, par une jurisprudence unanime.

L'examen de la géographie côtière conduit à une constatation difficilement contestable: aucune circonstance de caractère géographique ne permet de regarder comme inéquitable la ligne médiane entre les côtes qui se font face de Malte et de la Libye; toutes les circonstances de caractère géographique conduisent au contraire à regarder une telle ligne comme conforme à l'exigence fondamentale d'un résultat équitable.

Pour asseoir cette constatation avec plus de certitude, revenons un instant en arrière, Monsieur le Président, et remontons au début de l'opération de délimitation.

Les côtes de Malte et de la Libye se font face, même si elles ne sont pas rigoureusement parallèles mètre par mètre. Ces côtes — les maltaises aussi bien que les libyennes — engendrent des projections de plateau continental omnidirectionnelles. Sans le vis-à-vis libyen les projections maltaises s'étendraient jusqu'à 200 milles marins au moins des lignes de base de Malte. Sans le vis-à-vis maltais les projections libyennes s'étendraient jusqu'à 200 milles marins au moins des points de base de la Libye. En dépit de leur différence de taille, en dépit du caractère insulaire de l'un et continental de l'autre, les deux Etats seraient alors traités sur un pied d'égalité au regard du droit de la mer et de leur pouvoir générateur de plateau continental. Mais Malte a un vis-à-vis libyen, et la Libye a un vis-à-vis maltais, et chacun des deux pays est situé trop près de son vis-à-vis pour qu'il soit possible de lui conserver la plénitude de ses droits potentiels de plateau continental. Les projections des deux côtes se rencontrent et se chevauchent, et c'est de l'existence de ce front de chevauchements que naît le problème de délimitation soumis à la Cour.

Pour résoudre ce problème, l'égalité des Etats interdit de privilégier la projection de l'une des Parties au détriment de celle de l'autre. Les deux côtes sont juridiquement d'égale valeur. La projection maltaise n'a pas plus de poids que celle de la Libye, mais pas moins non plus; et la même chose est vraie de la projection libyenne. Chacun des deux Etats a une vocation d'égale valeur au plateau continental s'étendant jusqu'à une distance de 200 milles marins au moins de ses côtes. Chacun des deux doit cependant accepter une amputation. L'équité exige que cette amputation soit équilibrée et raisonnable. Diminuer l'amputation de l'un revient à augmenter l'amputation de l'autre. Aussi est-il nécessaire d'envisager pour commencer une méthode de délimitation qui soit capable de respecter l'égal droit de Malte et de la Libye à une zone de plateau continental s'étendant jusqu'à une même distance de leurs côtes respectives. La méthode susceptible de satisfaire à cette exigence est celle qui arrête la projection de chacune des Parties à un endroit tel que, si on la laissait se poursuivre plus loin, la projection d'égale valeur de l'autre se trouverait compromise. Une telle méthode existe: c'est celle de l'équidistance, représentée ici par une ligne médiane.

Voilà donc ce que Malte propose: commencer par prendre en considération la ligne médiane, qui reflète la configuration côtière et respecte les exigences du principe de distance.

Bien sûr, s'il apparaissait que cette ligne est inéquitable et déraisonnable en raison de l'effet exagéré de déviation provoqué par une caractéristique géographique mineure, il serait nécessaire de la corriger ou même, dans des cas extrêmes, de lui substituer une ligne basée sur une variante de l'équidistance ou une autre méthode.

Mais tel n'est pas le cas — à moins, bien entendu, et peut-être est-ce là tout le problème de considérer l'existence même de l'Etat maltais comme génératrice d'inéquité! Voici deux côtes situées incontestablement dans un rapport d'opposition frontale, dont le caractère de côtes se faisant face n'est pas douteux, et dépourvues de toute trace d'adjacence. Pas de configuration mineure, sur aucune des deux côtes, qui serait susceptible de faire «dévier latéralement la ligne d'équidistance» et d'amputer l'Etat d'en face «de zones situées juste devant sa façade maritime». Pas de saillant, pas de rentrant, pas de convexité, pas de concavité. Du côté maltais comme du côté libyen, des côtes régulières, d'une totale banalité, et assurément dépourvues de toute «caractéristique spéciale ou inhabituelle». Et ce qui est vrai des côtes l'est tout autant de l'espace qui les sépare. Dans cet espace pas la moindre île, pas le moindre rocher, pas le moindre haut-fond, que ce soit devant la côte de Malte ou devant la côte de la Libye, que ce soit du «bon» ou du «mauvais» côté de la ligne médiane. La Libye écrit que: «The question of the distorting effect which small islands may have on an equidistance line has always been a problem» (ci-dessus, RL, p. 80, note 1): l'observation est exacte, mais entre les côtes des deux Etats, pas le moindre îlot de nature à faire problème et à donner quelque piment à une géographie dépourvue d'originalité.

Quelle que soit la manière dont on aborde la situation géographique, elle apparaît banale, dépourvue de toute caractéristique particulière. Aucune déviation ou distorsion de la ligne d'équidistance assez importante «pour justifier une ligne de délimitation autre que la ligne médiane». Pas de résultats qui apparaissent «de prime abord extraordinaires, anormaux ou déraisonnables». Nous sommes presque en présence d'un cas d'école, que l'on aurait simplifié à l'extrême pour faciliter la démonstration. La situation géographique de notre affaire est plus que simple, elle est simpliste. Non, rien, vraiment rien, dans la géographie côtière ne conduit à jeter le doute sur le caractère raisonnable et équitable de la ligne médiane envisagée comme point de départ et à l'écarter comme ligne de délimitation définitive. Toute autre solution conduirait à refaire la nature et la géographie.

Le caractère raisonnable de la ligne médiane revendiquée par Malte s'éclaire encore davantage si l'on se rappelle que cette ligne, comme je l'ai indiqué hier, est située à peine plus au sud que ne le serait une ligne médiane que l'on tracerait entre la Libye et l'Italie en faisant abstraction de Malte. La prise en considération de Malte ne conduit en définitive pas à une ligne beaucoup plus défavorable pour la Libye que si Malte n'existait pas. Mais cette modeste conséquence de l'existence de Malte paraît, semble-t-il, encore excessive à la Libye...

Reste la longueur des côtes.

Une différence dans la longueur des façades côtières produit par elle-même une délimitation accordant à chaque Etat une superficie différente de plateau continental, mais il est clair que la longueur comparée des côtes ne saurait être considérée comme une circonstance appelant *per se* un ajustement de la ligne d'équidistance de départ. Si, au terme de la prise en considération et de la mise en balance des circonstances pertinentes, la ligne d'équidistance paraît inéquitable, ce sera pour des considérations autres que la différence dans la longueur des façades côtières: un effet de déviation exagéré dû à un accident géographique mineur, par exemple, ou un empiétement disproportionné; ce ne sera pas simplement parce que les côtes en présence n'ont pas la même longueur.

Si l'arrêt du *Golfe du Maine* a corrigé la ligne médiane entre les côtes se faisant face du Massachusetts et de la Nouvelle-Ecosse, dans le second secteur, en fonction de la longueur comparée des façades côtières des deux pays dans le premier secteur (c'est-à-dire à l'intérieur du golfe), c'est en raison d'une considération spécifique à cette affaire, à savoir que le point terminal de la frontière internationale entre le Canada et les Etats-Unis est situé dans le coin nord-est du golfe et non pas au milieu de ce dernier. C'est cette considération particulière, relevant de ce que la Chambre a appelé la «géographie politique» (*C.I.J. Recueil 1984*, p. 273, par. 42, et p. 328, par. 196; cf. p. 327, par. 195, et p. 340, par. 231), qui a conduit la Chambre à faire intervenir *indirectement* la longueur comparée des côtes dans l'appréciation du caractère équitable de la ligne médiane (p. 334-335, par. 217-218). La Chambre a précisé que c'est seulement «dans ces conditions» qu'elle a fait jouer la longueur comparée des côtes comme élément de la vérification de l'équité de la ligne médiane provisoire (p. 334, par. 218; cf. p. 312-313, par. 157). A aucun moment la Chambre n'a, il convient de le noter, comparé la *ratio* des longueurs côtières totales des deux pays dans l'aire de délimitation avec la superficie totale d'espaces maritimes attribués à chacun d'eux. Aucun élément de ce genre n'a été pris en considération dans l'arrêt.

Il ne saurait être question, on le voit, de condamner *ipso facto* et automatiquement comme inéquitable toute ligne médiane dès lors que les longueurs des deux côtes ne sont pas dans un rapport de 1:1. Si on procédait ainsi, cela signifierait que la longueur comparée des côtes deviendrait une circonstance pertinente — la seule circonstance pertinente, sans doute — susceptible d'exercer une sorte de droit de veto, puisque, même dans le cas où toutes les autres circonstances pertinentes établiraient le caractère équitable de la délimitation équidistante de départ, une différence dans les longueurs des côtes suffirait à neutraliser ce résultat et à condamner la ligne d'équidistance ou la ligne médiane. La proportionnalité des longueurs de côtes deviendrait alors la circonstance pertinente la plus déterminante, celle en tout cas à prendre en considération en tout premier lieu, puisque c'est d'elle que dépendrait le caractère équitable de la ligne; et l'on ne serait pas loin, une fois de plus, de la proportionnalité érigée en source du titre ou en méthode autonome et directe de délimitation. En un mot, Monsieur le Président, l'égalité des longueurs côtières n'est pas une condition juridiquement nécessaire du recours à la ligne médiane.

C'est à mon ami Ian Brownlie que revient la tâche d'examiner les questions de la proportionnalité, de la longueur des côtes et de la magnitude territoriale, que je n'ai fait qu'évoquer en passant.

Pour ma part, Monsieur le Président, je demande respectueusement à la Cour son indulgence pour un exposé que l'importance de la matière et l'enchevêtrement des thèses de nos adversaires a condamné à une longueur que je sais excessive.

*L'audience est levée à 13 h 5*

# FOURTEENTH PUBLIC SITTING (3 XII 84, 10 a.m.)

*Present:* [See sitting of 26 XI 84.]

## ARGUMENT OF PROFESSOR BROWNLIE

COUNSEL FOR THE GOVERNMENT OF MALTA

Professor BROWNLIE: Mr. President, Members of the Court. May it please the Court.

### I. INTRODUCTION

It is my task to examine the legal significance of coasts with particular reference to the points at issue in this case. In the course of this examination I shall address the question of proportionality and the Libyan argument that the extent of the land territory behind the coast is relevant to delimitation.

As the Court might reasonably expect, the particular focus of my argument will be the family of Libyan contentions concerning the length of coastiines set forth in the course of the submissions appended to the Libyan Reply.

The relevant submissions are as follows:

> "5. Equitable principles do not require that a State possessing a restricted coastline be treated as if it possessed an extensive coastline.
>
> 6. In the particular geographical situation of this case, the application of equitable principles requires that the delimitation should take account of the significant difference in lengths of the respective coastlines which face the area in which the delimitation is to be effected.
>
> 7. The delimitation in this case should reflect the element of a reasonable degree of proportionality which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the respective States and the lengths of the relevant parts of their coasts, account being taken of any other delimitations between States in the same region." (P. 103, *supra.*)

The last of these submissions clearly reflects the *dispositif* of the Judgment of this Court in the *North Sea Continental Shelf* cases and thus the focus appears to be the familiar subject of proportionality. However, it must be emphasized that the apparently orthodox reliance upon the concept of proportionality in the Libyan argument is but the superstructure of a forensic vehicle based upon a variety of elements. Proportionality represents but the surface and is not the inner structure of the argument which is heterodox and radical to a considerable degree. This state of affairs is revealed by the content and order of the submissions at the end of the Libyan Reply. Three of these, which I have already recited, relate to the length of coastlines, and of these three, it is the third alone which is concerned with the issue of proportionality.

The general structure of the Libyan argument, as revealed at length in the course of the written pleadings, is substantially incompatible with a legally justifiable reliance upon the concept of proportionality and this incompatibility takes the following forms.

First, the concept of proportionality is relied upon as a primary basis of delimitation, that is to say, as an independent source of rights over shelf areas, and such reliance is contrary to legal principle.

Secondly, the form in which the test of proportionality is offered by Libya — which involves the reference to the relevance of length of coasts — is inapposite in the geographical circumstances of the present case.

Thirdly, the Libyan argument relies upon the length of coasts as an independent principle, not necessarily connected with proportionality, and this is evident from the submissions.

Fourthly, the Libyan pleadings relate the concept of coasts to the argument that the size of the landmass behind the coasts provides "a legal justification for a State's entitlement to continental shelf rights over maritime areas before its coast" (**II**, LCM, para. 2.48; para. 4.19).

Thus it follows, Mr. President, that the matters raised by the Libyan pleadings call for a canvass of issues which extend well beyond the question of proportionality as it is normally identified. Indeed, significance of coasts, including the length of coasts, is worthy of consideration as a matter of principle and this irrespective of the particular form of the Libyan argument.

In consequence, in the first part of my presentation I shall address a series of issues which are raised directly by the Libyan thesis that "the application of equitable principles requires that the delimitation should take account of the significant difference in the lengths of the coastlines which face the area in which the delimitation is to be effected" — I refer to the words of the sixth Libyan submission. Those issues are as follows:

First, the general significance of coasts in maritime delimitation treated as a question of principle.

Second, the significance of coastal configurations in relation to continental shelf delimitation.

Third, the identification of the area relevant to the decision of the dispute.

Fourth, the concept of equality and the geographical features which establish the legal framework of the process of delimitation.

The examination of these questions will have two objectives. The first is the refutation of the simplistic Libyan thesis based upon the lengths of coastlines, and the second is to lay the foundations for an enquiry into the function of the concept of proportionality in the present case.

## II. THE GENERAL SIGNIFICANCE OF COASTS IN MARITIME DELIMITATION AS A QUESTION OF PRINCIPLE

The first issue I shall address within the scheme I have outlined is the significance of coasts in maritime delimitation seen as a question of general principle.

The Libyan argument requires that delimitation should depend on differences in the length of coasts and, in this way, it approaches the concept of coast in a highly abstract form. Length is presented as important as such, and becomes a quantity divorced from the pertinent geographical relationships overall. Moreover, the significance of the greater length of Libyan coasts is presented in conjunction with the assertion that the extent of the land territory behind the coast of Libya is also relevant.

This thesis of the maritime reflection of territorial magnitude is sometimes presented in terms of proportionality (see **I**, LM, paras. 6.90-6.93; **II**, LCM, paras. 6.25-6.32 ; and *supra*, LR, paras. 7.01-7.22), sometimes in terms of a theory based on the concept of natural prolongation (see **II**, LCM, paras. 2.48, 4.19-4.24; *supra*, LR, para. 5.12) and at yet other times in terms of a general description of the circumstances relevant to the delimitation process (*supra*, LR, paras. 3.01-3.23, 6.22, 8.03, 8.15-8.16).

Within the economy of the Libyan case the argument based upon length of coasts and upon the magnitude of Libyan territory behind the coasts remains always the same argument. Removed from the various categories in which it is presented, the argument comes to this. According to Libya, the application of equitable principles requires that the territorial magnitude of a State be reflected in the delimitation of continental shelf areas within the relevant area, and this territorial magnitude is represented either by the greater length of the Libyan coast compared with that of Malta, or by the greater size of the Libyan landmass, or by these two factors in combination.

This formulation of the basis of the Libyan claim does not appear as such in the Libyan pleadings, but it is a fair statement of the essence of the positive aspect of the Libyan case. The use of the concepts of proportionality and natural prolongation in the Libyan written pleadings involves no more than elements which are intended to supplement and consolidate the principal thesis.

The outcome, Mr. President, is a double paradox. In these proceedings Libya
asks for a delimitation which follows the general direction of the so-called Rift
⑨ Zone, as defined in the Libyan Memorial, and illustrated by Map 17 of that
Memorial.

㉗ Reference may also be made to the axial ridge line illustrated on Map 10 of the
㊹ Libyan Reply and which may also be seen on Figure 13 of Malta's dossier. One
may also refer to the Libyan proposal of 1973 indicated on Map 9 of the Libyan
⑤ Memorial and to be found again in Figure 1 of Malta's dossier. In other words,
Libya is claiming the lion's share, a virtual monopoly of the continental shelf
areas within the relevant area. If Libya were to have its way, Malta would be left
with a very small fraction of the shelf areas lying between the two countries.

Yet, and here is the first paradox, this claim is based upon the application of equitable principles. Moreover, there is a second paradox. The Libyan position is not based upon actual coasts, on geography and coastal relationships as such, but upon comparisons of magnitudes of land territory and lengths of coasts.

The goods in which the Libyan argument trades are geopolitical and, correctly understood, the argument involves a claim to distributive justice and to apportionment of the shelf in accordance with criteria of comparative territorial magnitude. In the words of the Libyan Counter-Memorial:

> "Malta's claim that a small island — as Malta is — or even a single basepoint on its coast would, as of right, generate a continental shelf of the same reach and extent as a continental coast of considerable length is neither in harmony with continental shelf doctrine nor supported by the jurisprudence of the Court. The continental shelf concept, though a legal concept and subject to legal interpretation according to its object and purpose, cannot be divorced from its factual basis. It is the landmass behind the coastline which — by its continuation into and under the sea — provides the factual basis and legal justification for a State's entitlement to continental shelf rights over maritime areas before its coast — and not mere distance or proximity from certain basepoints on the coast." (**II**, LCM, para. 4.19.)

The legal framework of the Libyan views as to the significance of coasts will be explored in due course. My present purpose is to approach the Libyan thesis, that delimitation should reflect territorial magnitude, on its own terms and thus to examine the broad politics and rational basis of maritime delimitation.

Mr. President, the Libyan thesis flies in the face of a long-established tradition in matters of maritime delimitation and jurisdiction. This tradition has always been that the seaward reach of the territorial sea, contiguous zones and fishery conservation zones should always be equal for all coastal States and, in that conception, would not reflect the varying territorial magnitudes of the coastal States. This picture is complicated a little by the fact that at certain periods in history there were regional patterns and so for example at one time it looked as though Mediterranean States generally would adopt a six-mile breadth as the regional rule for the territorial sea. Moreover, the rules governing outer limits tended to allow coastal States to choose varying limits within a certain maximum.

However, the major premise of equality of seaward reach remained untouched by such factors. No State and no publicist ever expressed the notion — until these proceedings — that territorial magnitude should play a role either in attribution or in delimitation of territorial sea and zones of jurisdiction for particular purposes.

The well-known works of Jessup, published in 1927 *(The Law of Territorial Waters and Maritime Jurisdiction)* and Gidel, published in 1934 (Vol. 3 of *Le droit international public de la mer*), make no reference to criteria of territorial magnitude, nor do they suggest that island States should be in any respect disadvantaged.

The tradition of equality of seaward reach of jurisdiction is reflected in Article 12, paragraph 1, of the Geneva Convention on the Territorial Sea and the Contiguous Zone adopted in 1958. In respect of the delimitation of the territorial sea as between two States whose coasts are opposite or adjacent to each other, this provision prescribed a median line. However, the provision did not apply "where it is necessary by reason of historic title or other special circumstances" to delimit the territorial seas of the two States in some other way. An almost identical provision appears in the Convention on the Law of the Sea of 1982 (Art. 15, para. 1).

It is ironical to note, more or less in passing, that, when the régime of delimitation of the territorial sea was liberalized in favour of the coastal State by this Court in the *Anglo-Norwegian Fisheries* case, that liberalization involved no reference to territorial magnitude. Indeed, the part of the Norwegian littoral concerned in the proceedings was very narrow and deeply indented and cut into by fjords. In its consideration of the "geographical realities" of that case the Court did not refer to the modest extent of Norwegian land territory (*I.C.J. Reports 1951*, p. 116 at pp. 127-128), but it is clear at least that Norway was not disadvantaged as a consequence of her cramped geographical position.

It is true, Mr. President, that the tradition of equality of seaward reach was developed in connection with the territorial sea and zones of jurisdiction for special purposes, the so-called contiguous zones. It is equally true that, when it first appeared, the continental shelf developed as an autonomous legal concept. However, there is no reason to believe that the shelf concept involved a radical break with tradition in matters of maritime delimitation.

The terms of the Truman Proclamation, which is generally acknowledged as the precursor of the development of the shelf as a concept of customary international law, indicate the inherent unlikelihood of the development of criteria of the kind now urged upon this Court by my distinguished opponents. With your permission, Mr. President, I shall read the salient parts of the Proclamation issued on 28 September 1945.

First of all the consideranda:

> "Whereas the Government of the United States of America, aware of the long range world-wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged; and
>
> Whereas its competent experts are of the opinion that such resources underlie many parts of the continental shelf off the coasts of the United States of America, and that with modern technological progress their utilization is already practicable or will become so at an early date; and
>
> Whereas recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken; and
>
> Whereas it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon co-operation and protection from the shore, since the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources."

Then the Proclamation itself provides as follows:

> "Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.
>
> In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected."

It is immediately apparent that the criteria of attribution are highly practical in character. The emphasis is upon contiguity and the need for co-operation and protection from the shore in respect of the utilization and conservation of the resources of the sea-bed. No one reading the Proclamation could envisage the geopolitical criteria now offered in the Libyan pleadings. The references to contiguity and the element of security or self-protection are reminiscent of the thinking behind the concepts of the territorial sea and contiguous zone. Moreover, the position of the coastal State was strengthened when the State practice relating to shelf claims developed on the basis of the inherent rights of the coastal State, which were not dependent upon express claims or effective occupation.

The jurisprudence on the delimitation of shelf areas lying off opposite or adjacent States does not represent a challenge to the general equality of coastal States in respect of maritime jurisdiction. On the contrary, the decisions involve the working out of the concept of equality in relatively complex geographical circumstances. As I shall demonstrate later on in this presentation, the key decisions on shelf delimitation provide no support whatsoever to the Libyan position on the significance of coasts and lengths of coasts.

Mr. President, any attribution of maritime jurisdiction and any consequent issues of delimitation lead to a consideration of the political implications of coastal geography. In as much as the conduct of the parties and elements of acquiescence are relevant in the particular case, maritime delimitation bears certain similarities to the delimitation of land boundaries. And, of course, in both cases the alignment may be the subject of political agreement. In other respects the delimitation of sea-bed boundaries as between opposite or adjacent States is very closely and in most cases exclusively a question of the political (and therefore legal) implications of coastal geography, and this was recognized by the Judgment of the Chamber in the *Gulf of Maine* case (*I.C.J. Reports 1984*, p. 327, para. 195).

The political implications of coastal geography were perceived very clearly by the Court in the *Anglo-Norwegian Fisheries* case. In the well-known passage in which the Court referred to "the close dependence of the territorial sea upon the land domain", the Court carefully indicated the two different but related consequences of being a coastal State. On the one hand, the coast generates title: and thus the Court observed that "it is the land which confers upon the coastal State a right to the waters off its coasts" (*I.C.J. Reports 1951*, p. 133). On the other hand, "the drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast" *(ibid.)*. Thus the land is both a generator of rights and a source of limitation and control over the ambit of those rights: the coast prefigures the delimitation of the rights the existence of which are contingent upon it.

The link between continental shelf and pre-existing concepts of maritime law was clearly recognized by the Court in its Judgment in the *North Sea Continental Shelf* cases. The relevant passage reads as follows:

> "The doctrine of the continental shelf is a recent instance of encroachment on maritime expanses which, during the greater part of history, appertained to no-one. The contiguous zone and the continental shelf are in this respect concepts of the same kind. In both instances the principle is applied that the land dominates the sea; it is consequently necessary to examine closely the geographical configuration of the coastlines of the countries whose continental shelves are to be delimited. This is one of the reasons why the Court does not consider that markedly pronounced configurations can be ignored; for, since the land is the legal source of the power which a State may exercise over territorial extensions to seaward, it must first be clearly established what features do in fact constitute such extensions. Above all is this the case when what is involved is no longer areas of sea, such as the contiguous zone, but stretches of submerged land; for the legal régime of the continental shelf is that of a soil and a subsoil, two words evocative of the land and not of the sea." (*I.C.J. Reports 1969*, p. 51, para. 96.)

It may be remarked that this passage is redolent of continuity of doctrine and a traditional approach to the concept of the continental shelf.

The following passage from the decision of the Anglo-French Court of Arbitration is of interest in the same connection:

> "In international law . . . the concept of the continental shelf is a juridical concept which connotes the natural prolongation under the sea not of a continent or geographical landmass but of the land territory of each State." (Decision of 30 June 1977, para. 191.)

I would like to complete this survey of the relevant judicial pronouncements by a quotation from the Judgment of the Court in the *Tunisia/Libya* case:

> "It should first be recalled that exclusive rights over submarine areas belong to the coastal State. The geographic correlation between coast and submerged areas off the coast is the basis of the coastal State's legal title. As the Court explained in the *North Sea Continental Shelf* cases the continental shelf is a legal concept in which 'the principle is applied that the land dominates the sea' (*I.C.J. Reports 1969*, p. 51, para. 96). In the *Aegean Sea Continental Shelf* case the Court emphasized that
>
> > 'it is solely by virtue of the coastal State's sovereignty over the land that rights of exploration and exploitation in the continental shelf can attach to it, *ipso jure*, under international law. In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State.' (*I.C.J. Reports 1978*, p. 36, para. 86.)
>
> As has been explained in connection with the concept of natural prolongation, the coast of the territory of the State is a decisive factor for title to submarine areas adjacent to it. Adjacency of the sea-bed to the territory of the coastal State has been the paramount criterion for determining the legal status of the submerged areas, as distinct from their delimitation, without regard to the various elements which have become significant for the extension of these areas in the process of the legal evolution of the rules of international law." (*I.C.J. Reports 1982*, p. 61, para. 73.)

Mr. President, there is no hint in these expressions of judicial opinion that the magnitude of the territory lying behind the coasts has any relevance either to entitlement or to delimitation. It is the sovereignty of the coastal State over its land territory which creates entitlement to rights over shelf areas. As in the case of the territorial sea, the sovereignty of the coastal State is the necessary condition for the existence of maritime jurisdiction. And naturally in this connection the sovereignty of a small coastal State counts in exactly the same way as that of a large coastal State.

The political thinking, or assumption, behind continental shelf claims has always regarded the coast, and not the landmass behind, as the relevant land territory. To think in terms of the size of landmass would involve transmuting maritime claims into synthetic territorial claims. The criteria of territorial magnitude and coastal length advanced by Libya in this case are criteria of distribution entirely divorced from the actual relation of submerged areas to the land territory. Such criteria have no relation to the practical criteria of attribution and appurtenance to be found in the text of the Truman Proclamation and in the jurisprudence of the Court. These criteria of attribution are as follows:

(*a*) the general concept of contiguity and appurtenance;
(*b*) the principle of security or self-protection;
(*c*) the principle of non-encroachment; and
(*d*) the conservation and reservation of the natural resources of the sea-bed in favour of the coastal State: and thus the continental shelf doctrine authorized the coastal State to object to the exploitation of the sea-bed in front of its coasts being undertaken by other States.

Such criteria relate to entitlement rather than to delimitation as such, but they provide the rationale for shelf claims and constitute the logical framework for the process of delimitation. It is immediately apparent that they are criteria connoting equality and not distribution according to territorial magnitude. Security, access to and reservation of resources, and non-encroachment are quantities which cannot be said to benefit some coastal States more than others. Whatever the problems of delimitation which call for solution, these can only affect marginal areas and the solution must be one within a broad framework of equality. Apportionment in accordance with external values, such as territorial magnitude, is fundamentally opposed to the traditional assumptions behind maritime delimitation.

These propositions can be tested by a consideration of the maritime frontiers of closed or semi-enclosed seas such as the Black Sea, the Baltic Sea and the North Sea. The situation of those seas is shown in Malta's dossier on Figures 19, 20 and 24 respectively. In all these cases the process of maritime delimitation is either virtually complete or well advanced. The pattern includes the establishment of territorial sea limits and the delimitation of areas of continental shelf. There is no sign in the practice of the States concerned that territorial magnitude is considered relevant to the process of maritime delimitation. Equality is the order of the day, both in respect of territorial sea, and continental shelf areas. After all, the automatic and generally equal effect on entitlement, which all coasts have, has resulted in the prominence of the subject of basepoints and baselines.

Mr. President, I can now present my conclusions as to the significance of coasts in maritime delimitation seen as a matter of general principle. In summary form, those conclusions are as follows:

First, the long-established tradition in matters of maritime jurisdiction and delimitation has been that the seaward reach of the territorial sea, contiguous zones and fishery conservation zones should always be presumed to be generally equal for all coastal States. It follows that the seaward extent of jurisdiction should not reflect the varying territorial magnitudes of the coastal States.

Second, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State; and the judicial sources of this doctrine of coastal State entitlement indicate that in this context the sovereignty of a small coastal State counts in exactly the same way as that of a larger coastal State.

Third, the criteria of attribution recognized in the Truman Proclamation and in the jurisprudence of the Court — and especially the principles of security or self-protection and of non-encroachment — are essentially different from the criteria of distribution relied upon by Libya which are divorced from the actual relation of submerged areas to the land territory.

I have concluded my examination of the Libyan case in relation to the general significance of coasts in the context of maritime jurisdiction. In the course of this I have made reference at appropriate points to the Libyan argument based upon territorial magnitude since that is closely associated with the Libyan position on the significance of coasts.

However, the Libyan argument presents the factor of relative landmass as an independent element, which in effect concerns both entitlement and delimitation, and which has no necessary connection with the issue of proportionality, and thus it is appropriate to examine this element separately and on its own terms.

The terms in which the Libyan argument is expressed do not lack either colour or emphasis. The Counter-Memorial expresses the matter in two distinct passages. In the first passage Libya states that:

> "the extent of the land territory behind the coast must be regarded as linked to the factor of the natural prolongation of the land territory of a State from

> its coast seaward by way of its continental shelf. The land territory behind Libya's extensive coast is immense, whereas both the coast and land territory of Malta are very small. Surely, the intensity of the natural prolongation must be greater — the prolongation, more natural — from the Libyan coast in arriving at a line of delimitation?" (**II**, LCM, para. 2.48.)

And elsewhere in the same pleading it is said:

> "The continental shelf concept, though a legal concept and subject to legal interpretation according to its object and purpose, cannot be divorced from its factual basis. It is the landmass behind the coast which — by its continuation into and under the sea — provides the factual basis and legal justification for a State's entitlement to continental shelf rights over maritime areas before its coast — and not mere distance or proximity from certain basepoints on the coast." (*Ibid.*, para. 4.19.)

These passages — and others which could be cited — indicate that it is the size of Libyan territory and not merely the length of its coastline which is the nub of the argument.

Thus the Libyan Reply contains the assertion:

> "If geography is not to be refashioned . . . the size of Malta and the size of Libya are undeniable facts relevant to the question of delimitation." (*Supra*, LR, para. 5.12.)

Mr. President, there are many reasons for rejecting the landmass factor as irrelevant to continental shelf delimitation.

In the first place, it involves a misunderstanding of the legal character of the concept of natural prolongation as it has evolved since the Judgment in the *North Sea Continental Shelf* cases. Indeed, as Judge Jiménez de Aréchaga noted in his separate opinion in the *Tunisia/Libya* case, the Judgment in the *North Sea Continental Shelf* cases made it clear that

> "'natural prolongation' is a concept divorced from any geomorphological or geological requirement and that it merely expresses the continuation or extension seawards of each State's coastal front" (*I.C.J. Reports 1982*, p. 116, para. 58).

The second reason for rejecting the landmass argument is that the factor of territorial magnitude has no necessary relation to the incidence or lengths of coastlines; and differences between spatial magnitudes could not be used except as an index for a process of spatial distribution of sea-bed areas.

Thirdly, the factor of territorial magnitude is completely alien to the concept of a boundary whether it is maritime or in land territory. In the course of disputes concerning territory and the location of land boundaries many arguments, some legal, some factual and political, may be advanced. As the Court will readily appreciate the relative magnitude of the Parties is a complete novelty in this respect. It is apparent that the factor of territorial magnitude is inimical to the idea of equity and this is no doubt why in historical terms it has not been invoked in relation to territorial disputes. The factor of territorial magnitude is equally unsuited to the resolution of continental shelf disputes and, as the Court recognized in the *Aegean Sea Continental Shelf* case (*I.C.J. Reports 1978*, pp. 36-37, paras. 86-90), shelf disputes have an essentially territorial character.

The fourth reason for rejection is that there is no judicial authority in support of the factor of relative magnitude. Indeed, the argument is so novel that tribunals have lacked the opportunity to reject it. However, it may be recalled that the United States employed an argument based upon the concept of "dominant interest" in the *Gulf of Maine* case, which has a very slight affinity with the Libyan thesis under examination. And it is to be noted that the Chamber gave no encouragement to the use of such a concept (*I.C.J. Reports 1984*, p. 246, pp. 340-342, paras. 223-237).

Certainly, there is no evidence of reference to territorial magnitude in the State practice concerning shelf delimitation. There is no evidence that States with large hinterlands, such as the USSR, Colombia, Venezuela, Iran, Saudi Arabia, or India, have had the benefit of any concept of territorial magnitude in effecting delimitations with smaller neighbours.

Finally, it should be borne in mind that, if territorial magnitude were to be a relevant factor, the consequences of State succession would be radical. The appearance or absorption of small coastal States would result in a need to re-order maritime delimitations carried out on the basis of the previous relative magnitudes.

Thus, a series of important considerations of principle and good policy strongly militate against any legitimation of the argument based upon territorial magnitude and I have perhaps given it more attention than it really deserves.

I shall now return to the major elements in my presentation, moving from the general significance of coasts in maritime delimitation to a consideration of the precise significance of coastal configurations for the purposes of continental shelf delimitation.

## III. The Legal Significance of Coastal Configurations in Relation to Continental Shelf Delimitation

In the *Tunisia/Libya* Judgment the Court underlined the significance of coasts in relation to continental shelf entitlement. In the view of the Court the shelf included any sea-bed area possessing a relationship of adjacency to the coast of the territory of the coastal State, and it was stated that "the geographic correlation between coast and submerged areas off the coast is the basis of the coastal State's legal title" (*I.C.J. Reports 1982*, p. 61, para. 73). The Judgment as a whole places considerable emphasis upon actual coasts both in the context of entitlement and of delimitation (see, in particular, *ibid.*, pp. 88-89, paras. 127-129). Moreover, in the *dispositif* the relevant circumstances to be taken into account included "the general configuration of the coasts of the Parties, and in particular the marked change in direction of the Tunisian coastline between Ras Ajdir and Ras Kaboudia" (*ibid.*, p. 93, para. 133, B (2)). This focus upon coasts and coastal relationships had, after all, been characteristic of the earlier decisions on shelf delimitation, and the Judgment of the Chamber in the *Gulf of Maine* case again emphasizes the close connection between the geography of coasts and the choice of equitable criteria (*I.C.J. Reports 1984*, p. 327, para. 195).

And yet the Libyan argument presents coasts either as an abstraction based upon length or as a novel concept related to the landmass of the territory lying behind the coast. In contrast, Malta uses the term coasts within the framework of legal principle.

In the view of Malta, based upon the jurisprudence of the Court, the significance of coasts is simply an aspect of the political and therefore the legal significance of geographical relationships. In this conception it is location and relationship which are the determining factors, and not length as an abstract quantity.

In principle, the fact that a coast is "long" or "short", or that it is the coast of an island or peninsula, or that it is part of a concave or convex coastline, is much less significant than the location of the particular coasts in relation to other coasts. In the final analysis it is location which determines the decisive relationships, not length and not insularity. Indeed, the relative significance of length is recognized even in the formula relating to proportionality in the *dispositif* of the Judgment in the *North Sea Continental Shelf* cases. The element of proportionality is there defined by reference to the length of the coast "measured in the general direction of the coastline" (*I.C.J. Reports 1969*, p. 54, para. 101, D (3)), and a similar formulation appears in the *dispositif* of the Judgment in the *Tunisia/ Libya* case (*I.C.J. Reports 1982*, p. 93, para. 133, B (5)).

Some examples may be taken from the cases. In the *North Sea Continental Shelf* cases the relevant geographical circumstances were the existence of three coastal States with adjacent continental shelves, of which the middle State, the German Federal Republic, had a markedly concave and recessing coast. As the Court made clear in the Judgment, the fact that the coastlines were comparable in length was only significant given the configuration of the relevant coastlines and their relation to each other (*I.C.J. Reports 1969*, p. 49, para. 91). As the Court pointed out, the facts presented a situation of "equality within the same order" *(ibid.)*.

Further examples are furnished by the Decision of the Anglo-French Court of Arbitration in 1977. In particular, the role of the Channel Islands was determined by their distance from the English mainland, and by their location close to the French coast and practically within the arms of a gulf on the French coast (Decision, paras. 181-190). Again the role of Cornwall and the Scilly Islands, and of Finistère and Ushant, in respect of the Atlantic region in the same case, was determined by the location and alignment of these features in relation to each other and in relation to the continental shelf which extended a great distance into the Atlantic Ocean (Decision, paras. 233, 240-248). Some representation of the lines drawn on that basis may be seen in the Malta dossier (Fig. 25). Thus, in judicial practice features are not classified as "islands" or "long coasts" or "peninsulas" for purposes of delimitation. The focus is broadly upon the overall geographical circumstances of the particular case (Decision of the Anglo-French Court of Arbitration, paras. 94, 239-240). In all these examples the length of particular coasts may be relevant as a part of a pattern of geographical circumstances, but it is the location and relationship of features to one another which are the key elements in the analysis. The length of this or that coastline taken in isolation cannot play a role either in analysis with a view to selecting a method of delimitation or in the process of delimitation as such.

## IV. The Identification of the Area "Relevant to the Decision of the Dispute"

The conclusion that it is the overall geographical context which is significant, and not coasts or lengths of coasts as such, leads to a further consideration. In the *Tunisia/Libya* case the Court indicated that the practical aspect of assessing the relationship of the coasts of the Parties involved the identification of the area "relevant to the decision of the dispute". In the words of the Court:

> "As has been explained in connection with the concept of natural prolongation, the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it. Adjacency of the sea-bed to the territory of the coastal State has been the paramount criterion for determining the legal status of the submerged areas, as distinct from their delimitation, without regard to the various elements which have become significant for

> the extension of these areas in the process of the legal evolution of the rules of international law."

And the Court continues:

> "74. The coast of each of the Parties, therefore, constitutes the starting line from which one has to set out in order to ascertain how far the submarine areas appertaining to each of them extend in a seaward direction, as well as in relation to neighbouring States situated either in an adjacent or opposite position."

The Court continues:

> "The only areas which can be relevant for the determination of the claims of Libya and Tunisia to the continental shelf in front of their respective coasts are those which can be considered as lying either off the Tunisian or off the Libyan coast. These areas form together the area which is relevant to the decision of the dispute. The area in dispute, where one claim encroaches on the other, is that part of this whole area which can be considered as lying both off the Libyan coast and off the Tunisian coast." (*I.C.J. Reports 1982*, p. 61, paras. 73-74.)

Mr. President, it is the overall geographical circumstances which must establish the general dimensions of the area relevant for the purposes of delimitation. The *entire* coasts of Malta and Libya *facing one another* must be taken into account in determining the relevant area. In the result the relevant area is bounded by lines joining the terminus of the land frontier with Tunisia and the relevant point on the eastern aspect of Cyrenaica to the respective western and eastern aspects of the island of Malta. The result, embellished by a median line, is the simple trapezium figure employed by Malta in the written proceedings. That trapezium has been indicated on the basemap in front of the Court and may also be
㉚⑬ seen on Figures 7 and 26 in the Malta dossier.

There is in my submission no case for taking a sector of Libyan coast having an eastern terminus at Ras Zarruq as the basis for the relevant area. The Libyan pleadings have failed to justify this arbitrary compression of the relevant area (**I**, LM, para. 10.09; **II**, LCM, para. 2.44; *supra*, LR, para. 5.14; and para. 6.07).

It is quite simply indefensible to accept the relevance of the Libyan coastline as far west as Ras Ajdir and at the same time to stop eastward at Ras Zarruq, which is much less tangentially opposite Malta than Ras Ajdir. The asimuth from Ras Ajdir to Malta is very much at an angle. The straight line from Ras Zarruq to Malta is much less at an angle. The reasons for which in the Libyan view the area east of the Medina Escarpment should be excluded have no relevance to the coastal relationships at present under examination and they lack relevance in any case.

In this same connection, if the actual coastal relationships are considered as such, it would be odd indeed if the embayment of the Gulf of Sirte, which commences more or less at Ras Zarruq, should have the dramatic consequence that sea-bed areas which would otherwise clearly satisfy the test of relevance should cease to be relevant, at least for Malta's part in the delimitation process. In principle, it should be attitude of coasts to each other and not the distance between them which determines what is relevant, that is to say, fit to be divided between the Parties in dispute.

The Libyan approach to the relevant area in its eastern aspect is quite simply free from any tincture of rationality. In the first place, Libya makes a claim which encroaches extensively upon the sea-bed adjacent to Malta's coasts, and at the same time takes a spatially restricted view of relevance in the areas to the east of Ras Zarruq. Of course, the fact that the Gulf of Sirte is an embayment should not give Libya an advantage in the definition of the relevant area for purposes of delimitation vis-à-vis Malta.

In the second place, the logic of the Libyan argument involves treating the distance between the facing coasts as a factor which is detrimental to Malta in the general context of identifying relevant areas, and yet is not detrimental to Libya in the context of claiming areas very close to the coasts of Malta.

I would respectfully ask the Court to refer to the available pictorial indications of the Libyan claim. The first of these is the Libyan proposal of 1973, which ⑤ appears in Malta's Illustrations in Figure 1 and which appears originally as Map 9 in the Libyan Memorial.

The line indicated in red very close to Malta on that map conspicuously assumes that there are relevant areas to the east of the hypothetical azimuth drawn between Ras Zarruq and the eastern aspect of Malta's coast facing Libya. You have the red line of 1973 going round and up in an angular way and then we have the azimuth, a straight line on the map from Malta to Ras Zarruq. The disposition of the 1973 line quite clearly assumes there is territory, so to speak, to be divided to the east of a line between Malta and Ras Zarruq.

The other pictorial indications of the Libyan claim involve the so-called Rift ⑨ Zone as defined in the Libyan Memorial and illustrated by Map 17 of that ㉙ Memorial. The Rift Zone appears again on Map 12 of the Libyan Reply and ㉚ again on Map 13 of the Libyan Reply, in this case with the addition of the so-called "axial ridge line". The Rift Zone and the axial ridge line are depicted on ㊹ Figure 13 of Malta's dossier. A study of these maps shows that without any doubt a line which would follow the general direction of the Rift Zone, as requested in the submissions, necessarily involves the delimitation of shelf areas lying far to the east of the Malta to Ras Zarruq hypothetical azimuth.

The Libyan position of the extent of the relevant area in this case lacks foundation and is incompatible with the views Libya has held at various times on the extent of its claim as against Malta and, in particular, the east-west ambit of the different versions of the Libyan claim.

The view which Malta holds on the question of the relevant area is based upon the essentially simple coastal relationships between the two Parties. The areas included within the trapezium satisfy the test propounded by the Court in the *Tunisia/Libya* case (*I.C.J. Reports 1982*, p. 61, para. 74) and consequently can be considered as lying both off the coasts of Libya and off the coasts of Malta.

The embayment to the east of Ras Zarruq cannot be said to affect the essence of the coastal relationship. It is true that large areas of shelf are included, but that fact is in no way inimical to the view taken by Malta. It is the attitude of the coasts the one to the other which is paramount.

## V. THE CONCEPT OF EQUALITY AND THE GEOGRAPHICAL FEATURES WHICH ESTABLISH THE LEGAL FRAMEWORK

The identification of the area relevant to the decision of the dispute is a facet of the more general process which involves an analysis of the overall geographical circumstances with a view to establishing a geographical and legal framework for the delimitation. The geography of coasts produces the setting in which the criteria of equity must be applied and a primary criterion is that of equality. Thus in the *Gulf of Maine* case the Judgment stated:

> "that the Chamber's basic choice should favour a criterion long held to be as equitable as it is simple, namely that in principle, while having regard to the special circumstances of the case, one should aim at an equal division

> of areas where the maritime projections of the coasts of the States between which delimitation is to be effected converge and overlap" (*I.C.J. Reports 1984*, p. 327, para. 195).

The Chamber gave great emphasis to this principle of equal division, and remarked that it was "a criterion which need only be stated to be seen as intrinsically equitable" (*ibid.*, para. 197).

The problem no doubt is to apply the concept of equality to the geography of the particular case, and the coastal geography of the *Gulf of Maine* case cannot be said to be comparable to that of the present case. Of the preceding jurisprudence, the Decision of 1977 in the Anglo-French arbitration may be singled out as containing elements, both geographical and legal, which may be of some relevance in approaching the problem of delimitation in the present case.

The Decision in the Anglo-French case formulated and applied two concepts, which formed the foundation of the reasoning of the Court of Arbitration, and which are in many ways instructive and suggestive.

The first of these concepts is that of a relationship of approximate equality within the geographical and legal framework presented by the facts (see the Decision, para. 181).

The second of these concepts is that of "the balance of geographical circumstances" between the parties in the particular region. In the Anglo-French Continental Shelf arbitration this concept was employed prominently as a tool of analysis and as an important part of the process of delimitation.

In the case of the region of the English Channel the balance of geographical circumstances resulted from the relationship of opposite coasts (Decision, paras. 181-182), the unity and continuity of the region (*ibid.*, para. 181), and the broad equality of the coastlines in relation to the continental shelf (*ibid.*, paras. 182-183, 196, 199, 201).

In the case of the Atlantic region the Court sought the geographical features which would establish the legal framework for its decision (*ibid.*, paras. 232 *et seq.*). The conclusion reached was that in the Atlantic region "the situation geographically is one of two laterally related coasts, abutting on the same continental shelf which extends from them a great distance seawards into the Atlantic Ocean" (*ibid.*, para. 241; and see also para. 242).

There can be no doubt that the determination of the key geographical features, on the basis of the "actual geographical conditions of the particular area of continental shelf to be delimited" (*ibid.*, para. 240), is in practice a more significant analytical tool for the Court than generalizations about lengths of coasts, or about islands, or about the distinction between "opposite" or "adjacent" States.

The concept of a "balance of geographical circumstances" is at the same time both simple and complex. The concept is not based on the idea of symmetry, nor on the equality of the actual mass of geographical features, and still less on the idea that coastal frontages should be of equal length.

Thus in the Anglo-French case there is no indication that the Court of Arbitration regarded the equality of lengths of coastlines as a necessary condition in all cases for the determination of a balance of geographical circumstances. The position and attitude of geographical features are regarded as more significant than length of coasts as such. Thus in the Anglo-French case the legal framework for delimitation in the Atlantic region consisted of relatively short segments of coast abutting on the shelf areas to be delimited (*ibid.*, paras. 233-235; Malta Illustrations, Fig. 25). Both maritime frontiers were based upon attentuated features, and so much so that the French Republic had contended that the United Kingdom had no maritime frontage facing the region.

In the Anglo-French case a particularly striking feature is the readiness of the Court not only to attach the same significance to the Cornish peninsula as it did to the coast of Finistère but also to regard the Scilly Isles lying some 21 miles beyond the Cornish peninsula as a part of the coastline of the United Kingdom (Decision, paras. 235, 248-249). It is true that the further projection westward of the Scilly Isles was regarded as a cause of distortion justifying a modification of the equidistance method which was otherwise applicable in the circumstances of the Atlantic region. But the important point is the significance for delimitation of every very attenuated feature provided they bear the necessary relation to the shelf areas to be delimited.

In certain geographical circumstances short sectors of abutting coast will play a major role in delimitation providing their location is critical. In the case of the region of the English Channel the two long opposite coasts having a broad equality in relation to the continental shelf provided the balance of geographical circumstances and therefore the legal framework. In the case of the Atlantic region the key features were constituted by two peninsulas and both Ushant and the Scilly Isles were treated as mainland for certain purposes. Indeed Ushant was given full effect in respect of a delimitation affecting shelf areas reaching far out to the 1,000-metre isobath. Point M of the line established by the Court of Arbitration involves giving full effect to Ushant and this point plays a major role in the determination of the final sector of the delimitation from Point M to Point N, a line approximately 170 nautical miles in length (Decision, para. 254; Malta Illustrations, Fig. 25).

In the present case, it is fair to say, the geographical framework is a hybrid of the two situations presented in the Anglo-French case. The small island group of Malta and its dependencies face the long Libyan coast. Thus the relationship of the principal coasts is partly that of the Atlantic region, where short sectors of abutting coast were given a significant role in the delimitation, and partly that of the long opposite coasts of the English Channel. The coasts of Malta and Libya are not laterally related, like those of the Atlantic region, and of course there is no equality of length of coast.

In the geographical circumstances of the present case what is the balance of geographical circumstances? In one sense there is no balance, since the two principal features, the island State of Malta and the long coast of Libya, do not share a common identity. There are no parallel circumstances of the kind which permitted the Court in the *North Sea Continental Shelf* cases to regard the three States concerned as being in "a geographical situation of quasi-equality" (*I.C.J. Reports 1969*, pp. 49-50, para. 91). There is thus no possibility of equality being "reckoned within the same plane" in the words of the Judgment in the *North Sea Continental Shelf* cases (*ibid.*).

How then is a balance of geographical circumstances, an approximate equality, to be found as between Malta and Libya? Mr. President, the beginning of the answer is to be found in the Judgment in the *North Sea Continental Shelf* cases, where the Court outlined the *modus operandi* of delimitation in the following way:

> "Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy. But in the

> present case there are three States whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coastlines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two. Here indeed is a case where, in a theoretical situation of equality within the same order, an inequity is created. What is unacceptable in this instance is that a State should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline is roughly convex in form and in the other it is markedly concave, although those coastlines are comparable in length. It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result." (*I.C.J. Reports 1969*, pp. 49-50, para. 91.)

The task as always is to make legal sense of the actual geography and to avoid imposing a solution which involves, so to speak, going behind the real geographical and political circumstances. In the present case, the fact that there is no natural quasi-equality as between the Parties has the simple consequence that the island State of Malta and the long-coast State of Libya constitute, so to speak, neutral quantities in their relationship. The group of islands forming the Republic of Malta cannot be treated as an incidental special feature falling within a geographical and legal framework established by other primary elements in the situation. The facts of this case are entirely unlike those concerning the Channel Islands region in the Anglo-French case. There the key elements were the fact that the Channel Islands region formed part of the English Channel, the Parties facing each other as opposite States having almost equal coastlines, and were "wholly detached geographically from the United Kingdom" (Decision of 30 June 1977, para. 199).

In the present case the Maltese group is a primary element in the geographical and legal framework, and thus plays a major role in that framework.

*The Court adjourned from 11.20 to 11.35 a.m.*

Mr. President, before the break I was considering, and I was near the end of my consideration, the concept of equality and the geographical features which establish the legal framework of any delimitation of continental shelf areas, and I had completed that part of my exposition by saying that in the present case the Maltese group is a primary element in the geographical and legal framework and plays a major role in that framework.

The geographical difference between Malta and Libya can have no automatic effect either of a beneficial or detrimental nature so far as Malta is concerned. Geography cannot be refashioned and there is no basis for the modification of the normal delimitation to avoid the distortion caused by any incidental special features.

In the present case there are no special features. Only the relationship of Maltese and Libyan coasts. The situation is neither legally nor geographically eccentric.

In the absence of a situation of geographical quasi-equality of the type visible in the *North Sea Continental Shelf* cases, the correct approach must surely be to ascribe equal legal significance to the coasts of the Parties for purposes of shelf delimitation. To do so is not to impose an equality which is not there originally. Indeed, equality is only in issue in the sense that it is necessary to avoid inequality of attribution. The law requires that the major geographical elements be given full faith and credit in the process of delimitation and this means giving equal significance to the coasts of the two States divided by the same continental shelf.

In legal terms Malta is a major element in the geographical and legal framework and the Maltese group produces the same seaward reach of sovereign rights over adjacent shelf areas as other coastal States. The island of Malta is a mainland and its coasts actually abut upon the shelf areas dividing the Parties. The southerly aspects of the coasts of Malta have an equality of seaward reach with the coasts of Libya.

The shape and location of the Malta group, and not the relative length of coastlines, are the determinants of the appropriate solution, and this can only be the application of the equidistance method.

The soundness of this approach is confirmed by the fact that even if Malta had a longer coast, this would have little or no effect on the generation of shelf rights
⑯ vis-à-vis Libya. I respectfully draw the attention of the Court to Diagram A of the Libyan Counter-Memorial, which is reproduced in the Malta dossier at
⑯ Figure 27. This diagram shows how the geography should work unless it is to be in legal terms "refashioned".

As Malta has pointed out in the Reply, practical experience of boundary-making in the Persian or Arabian Gulf, for example, supports the view that the normal legal reflection of real coasts takes the form of the equality of seaward extension of jurisdiction. The delimitations involving the island State of Bahrain are of particular interest and in the delimitations of Bahrain with both Iran and Saudi Arabia there is an equality of seaward reach; I refer the Court to the Malta dossier, Figure 22.

In the geographical circumstances of the present case only a delimitation based upon equidistance is appropriate. Such a solution involves no more than a recognition of the geographical and therefore the political realities. There are no incidental special features which call for modification of equidistance.

In the seaward relationship of Malta and Libya the equidistance method would reflect and not ignore the geographical circumstances and would not be inequitable in result. The use of equidistance in present circumstances simply cannot involve the sources of inequity detected by the Court in the very different circumstances prevailing in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 49, para. 89).

By way of concluding this section of my argument, Mr. President, I can summarize the position by saying that in the circumstances of this case, the only appropriate balance of geographical circumstances involves the preservation of the status quo. The principle of equality of seaward extension achieves this aim whilst the Libyan claim does not.

It is not merely the fact that Libya is contending for a virtual monopoly of the continental shelf dividing the Parties. The most striking feature of the Libyan argument is that it calls for an apportionment *de novo* of the sea-bed areas on the basis of an abstract formula based upon the discrepancy in the lengths of the coasts of the Parties. Such an approach essentially destroys the role of real coasts and actual geographical relationships. The introduction of the thesis that territorial magnitude is also relevant to delimitation gives further emphasis to the intention to divorce the process of delimitation from the realities of coastal geography and coastal relationships. In the result Libya does not so much seek to refashion geography but rather to set it aside altogether in favour of a scheme of distributive justice based upon an index of territorial magnitude.

## VI. The Role of Proportionality

### *1. Introduction*

The object of my argument until now has been the significance of lengths of coasts aside from questions classified as issues of proportionality. This treatment has been justified in part by the character of the Libyan arguments and by the order of Libya's submissions, and in part by the need to examine certain fundamental questions which lie behind the legal principles concerning delimitation of the shelf and maritime jurisdiction in general.

I must now address the group of related issues commonly categorized as the "question of proportionality", which is variously described as a "criterion", a "factor", a "principle", an "element" and a "test".

I would preface my remarks on this protean topic by emphasizing what may seem rather obvious after a perusal of the pleadings in this case; namely, that the term proportionality may stand for a variety of concepts and it may be used as a familiar and apparently orthodox label to give legitimacy to arguments which are entirely incompatible with legal principle and sound policy in matters of delimitation.

### *2. The Libyan View of Proportionality*

The Libyan view of proportionality in this case is really nothing more than a self-serving version of distributive justice which in essence involves apportionment *de novo* and not delimitation in accordance with legal principle. However, the essence of the Libyan position is to some extent obscured by the appearance, in the Libyan Memorial especially, of acknowledgments of matters of principle which are entirely orthodox. Thus the Libyan Memorial (**I**, LM, para. 6.90) quotes from the Decision in the Anglo-French arbitration to the effect that:

> "Proportionality . . . is to be used as a criterion or factor relevant in evaluating the equities of certain geographical situations, not as a general principle providing an independent source of rights to areas of continental shelf." (Decision, para. 101.)

Moreover, the precise version of the test which Libya relies upon is that of "proportionality in the light of the ratios between the lengths of the coasts of the Parties" (**I**, LM, para. 10.18) and this reflects passages of the Judgment and *dispositif* in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 52, para. 98; p. 54, para. 101, D (3)).

These elements of apparent orthodoxy are in fact merely the trappings of respectability, and are the mere appearance of legal principle. The essence of the Libyan argument is very different.

Mr. President, the substance of the Libyan argument in this case may be summarized as follows:

First, there is an attack on the equidistance method of delimitation both in general and in the context of this case.

Second, there is considerable reliance upon the concept of natural prolongation both in relation to the basis of title and in relation to delimitation.

Third, it is asserted — without reference to proportionality — that delimitation should take account of the difference in the lengths of the coasts of the Parties.

Fourth, the test of proportionality is invoked in the form based upon the ratio of the lengths of the coasts of the Parties.

Fifth, the "proportionality" argument is said to produce a result which coincides with and thus confirms the result based upon the concept of natural prolongation.

As I hope to demonstrate, the actual role of the Libyan proportionality argument and its relation to the other elements in the Libyan case is such that the argument is not in fact based upon proportionality in the legal sense at all. The use of the ratio of the lengths of coasts can only count as a proportionality argument if that test is justifiable on the basis of the geographical circumstances which constitute the legal framework of the particular case. In the absence of such justification, the Libyan reference to the lengths of coasts, like the reference to territorial magnitude in general, represents nothing more than a concept of distributive justice and the apportionment *de novo* of as yet unattributed areas of sea-bed.

### *3. Malta's View of Proportionality in Outline*

In contrast to the extravagant use to which Libya seeks to put the concept of proportionality, Malta has sought to place proportionality effectively within the broad context of the law concerning continental shelf delimitation. In accordance with this *modus operandi* Malta's position concerning proportionality can be stated in the following propositions:

First, the role of proportionality must depend upon the general legal framework.

Second, proportionality is a criterion for evaluating the equities of the given geographical situation but is not in itself an independent determinant of what is equitable within that geographical framework.

Third, the particular version of the criterion used by Libya — the reference to the ratio of the lengths of the respective coasts — is not of general application and cannot apply in the geographical circumstances of the present case.

Fourth, the role of proportionality as it is evidenced by the relevant jurisprudence is to maintain the equality of the seaward reach of mainland coasts.

Fifth and last, in the geographical circumstances of the present case it is the equidistance method which satisfies the criteria of equitable delimitation and which therefore *ipso facto* satisfies the criterion of proportionality as it should apply as between the opposite coasts of Malta and Libya.

### *4. The Importance to the Delimitation Process of the General Legal Framework*

Having summarized Malta's position with respect to proportionality, it is now necessary to probe more deeply into the variety of issues which shelter under that apparently simple category.

The adjective "proportionate" is somewhat question-begging. A dictionary definition of the adjective tends to be circular and thus the term is defined as meaning "that is in proportion, or in due proportion". Proportionality, the noun, is defined simply as "the quality, character, or fact, of being proportionate".

In the face of these unhelpful definitions it must follow that the standard of proportionality can only be given substance within a general framework such as that of the delimitation process. The element of proportionality is a part of the *team* of equitable principles; it is necessarily a congener of equitable principles and cannot be seen in the role of an intruder employing values which are at variance with the main body of equitable concepts and techniques.

The general legal framework is set by the actual geographical circumstances of the particular case regarded as a whole and in their main elements.

In the Anglo-French Continental Shelf case the Court pointed out that the concept of proportionality was "clearly inherent in the notion of a delimitation in accordance with equitable principles" (Decision, para. 98), and thus the role of proportionality may be relatively broad, and "not linked to any specific geographical feature" (*ibid.*, para. 99). And the same Court of Arbitration emphasized that "proportionality is not in itself a source of title to the continental shelf, but is rather a criterion for evaluating the equities of certain geographical situations" (*ibid.*, para. 246).

In this conception, proportionality is regarded simply as a part of the matrix of equitable principles and factors, which in turn are employed to determine the balance of geographical circumstances as the basis for the task of delimitation. In this mode, if the difference in the length of the respective coasts is irrelevant to the balance of geographical circumstances, that issue cannot be reintroduced in the form of an abstract proportionality test based on the ratio of the lengths of the coasts, which formula is supposed to be predominant in the matter of seeking an equitable solution, almost as if it were a species of *jus cogens*. However, there is a different and much narrower conception of proportionality to be seen in the jurisprudence. Proportionality may be employed as the justification for modifications in the primary delimitation which in general represents "the balance of geographical circumstances" and an "approximate equality" between the Parties. In this context the purpose is to abate disproportionate effects resulting from "the presence of islets, rocks and minor coastal projections" (*North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, p. 36, para. 57), or from "individual geographical features" (Anglo-French case, Decision, para. 100), or from the presence of islands "wholly detached" from the mainland and thus anomalous in relation to the "primary" equitable boundary (Anglo-French case, Decision, paras. 199, 201, 202).

In the circumstances of the present case, Mr. President, the delimitation can only reflect the configurations of the coasts of the Parties and only the equidistance method of delimitation can provide the necessary equitable reflection of the actual geography. No individual geographical features present causes of distortion, and there is no justification for modification of the primary delimitation based upon equidistance.

In the *métier* of thinking about proportionality the particular version based upon the ratio of coastal lengths represents a relatively exceptional mode, the application of which will not fail to produce markedly inequitable results if the legal and geographical context be inappropriate.

### 5. *The Ratio of Coastal Lengths Produces a Crude Apportionment in This Case*

And in the present case the context is wholly unsuited to the application of the test based upon the ratio of the respective lengths of coasts. This formula, applied in a geographical situation where there is no equality within the same plane, but simply the geographical data represented by the coasts of the Parties, would not maintain approximate equality between the Parties. The actual geography represents neither an inequality nor an equality, but simply the real geography of the Central Mediterranean. The legal value of equality is represented by the equal seaward reach of equally significant opposite coasts of the States concerned. The ratio of lengths of coasts is a formula which is an abstraction and would in the circumstances of this case introduce a legal inequality of major proportions.

To give more or less exclusive weight to this criterion of coastal length would involve a process not of delimitation but of simple apportionment. Such an apportionment of the area in issue would be in conflict with the basic notion that continental shelf rights appertain to the coastal State *ipso facto* and *ab initio*. As this Court said in the *North Sea Continental Shelf* cases:

> "More important is the fact that the doctrine of the just and equitable share appears to be wholly at variance with what the Court entertains no doubt is the most fundamental of all the rules of law relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, though quite independent of it, — namely that the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the sea-bed and exploiting its natural resources. In short, there is here an inherent right." (*I.C.J. Reports 1969*, p. 22, para. 19.)

The risk of misapplying the criterion of proportionality was spelled out by the Court of Arbitration in the Anglo-French case in the following passage:

> "In short, it is disproportion rather than any general principle of proportionality which is the relevant criterion or factor. The equitable delimitation of the continental shelf is not, as this Court has already emphasized in paragraph 78, a question of apportioning — sharing out — the continental shelf amongst the States abutting upon it. Nor is it a question of simply assigning to them areas of the shelf in proportion to the length of their coastlines; for to do this would be to substitute for the delimitation of boundaries a distributive apportionment of shares. Furthermore, the fundamental principle that the continental shelf appertains to a coastal State as being the natural prolongation of its territory places definite limits on recourse to the factor of proportionality. As was emphasized in the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, para. 91), there can never be a question of completely refashioning nature, such as by rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline; it is rather a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations or features in situations where otherwise the appurtenance of roughly comparable attributions of continental shelf to each State would be indicated by the geographical facts. Proportionality, therefore, is to be used as a criterion or factor relevant in evaluating the equities of certain geographical situations, not as a general principle providing an independent source of rights to areas of continental shelf." (Decision, para. 101.)

Mr. President, it may be helpful to the Court if I offer some elucidation of the intellectual problem which lies at the heart of the issue of proportionality and which is a potential cause of confusion.

On the one hand in the jurisprudence — the *North Sea Continental Shelf* cases, the Anglo-French case (Decision, para. 101), and the *Tunisia/Libya* case (*I.C.J. Reports 1982*, p. 60, para. 71) — it is emphasized that there can be no refashioning of geography and no consequent distributive apportionment of shares. On the other hand, the primary equitable delimitation may be subject to abatement or modification in order to avoid "distortion" or "disproportionate effects" caused by "individual geographical features". There is thus a certain contradiction, since the process of modification involves a certain refashioning of geography, albeit on a modest scale.

How can this apparent contradiction be resolved? The answer lies within the formula used by the Court of Arbibration in the Anglo-French case: the task of the Court is to seek an "approximate equality" as between the Parties. This "approximate equality" is based upon, and is not at odds with, the major geographical features abutting upon the shelf areas to be divided. It is a legal conception of equality. The process of modification of the primary delimitation which itself represents the principle of equality involves a further refinement of the principle of equality within the overall geographical framework. The concept of equal division of the area of convergence played an essentially similar role in the Judgment of the Chamber in the *Gulf of Maine* case, and was similarly subject to a certain degree of refinement (*I.C.J. Reports 1984*, p. 334, paras. 217, 218).

In short, the process of modification — if it is justified at all — is part of the overall judicial task of making legal sense of the geography. The judicial task is to impose a legal order within the geographical framework and not to provide a legal substitute for the principal geographical data in the particular case.

In the case of opposite States in the situation of Malta and Libya, where there are no displaced islands or other geographical complications, there is quite simply no room for modification of the primary delimitation which respects the equality of significance, in terms of seaward reach of jurisdiction, of the coasts of the two Parties. In this context a median line involves an *ex hypothesi* compatibility with the test of proportionality, since there are no sources of distortion and both coasts are given equal value. The fact that in the case of the opposite coasts geography prescribes a median line was recognized in the Judgment of the Chamber in the *Gulf of Maine* case (*I.C.J. Reports 1984*, p. 331, para. 206; pp. 333-334, paras. 216-218).

Another way of expressing the matter would be to say that the version of proportionality based upon the ratio of the difference of coastal lengths has no application in the case of opposite States. This point has been made before, and it is a pleasure to be able to quote from my learned friend, Professor Bowett. In his work on *The Legal Régime of Islands in International Law* (Dobbs Ferry, New York, 1979, p. 164), in the context of a discussion of the Judgment in the *North Sea Continental Shelf* cases, he makes the following observations:

> "The relevance of the proportionality factor is more difficult to assess. Clearly, it is entirely subservient to the primary criterion of 'natural prolongation', so there can be no justification for ignoring the geological evidence and simply dividing the shelf according to coastal ratios. Nor, indeed, are such ratios to be calculated on actual coastal length, for the Court envisaged a 'coastal front', a line of general direction to the coast rather than a line following its sinuosities (so that islands may count for this purpose, as part of such a 'front'). Indeed, it would seem that the proportionality factor might only be applied, or be meaningful, in the case of adjacent States (not 'opposite') where the existence of a markedly concave or convex coastline will produce a cut-off effect if the equidistance principle is applied: that is to say, will allocate to one State shelf areas which in fact lie in front of, and are a prolongation of, the land territory of another."

### 6. *The Special Function of the Test Based upon the Ratio of Coastal Lengths*

The Libyan pleadings have in effect equated the criterion of proportionality with the test based upon the ratio of the lengths of the coastlines or, at least, of the relevant part of the coastlines as this is understood by Libya. The section in the Memorial of Libya (I) which deals with "the role of proportionality" (paras. 6.90-6.93) states the test in terms of the ratio of coastal lengths and relies upon the Judgment in the *North Sea Continental Shelf* cases (para. 6.90, citing *I.C.J. Reports 1969*, p. 52, para. 98). The treatment in the Libyan Reply, *supra* (Chap. 7) is more nuanced but nevertheless relies exclusively upon the ratio of lengths (paras. 7.12, 7.20) apart, that is, from the size of the land territory (paras. 7.10, 7.16). Moreover, the Submissions appended to the Libyan Reply explicity refer to:

> "the element of a reasonable degree of proportionality which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the respective States and the lengths of the relevant parts of their coasts, account being taken of any other delimitations between States in the same region" (*supra*, LR, p. 102, para. 7).

This is proportionality as invoked in the Libyan pleadings. Aside from various other objections of principle to the form in which the proportionality argument is invoked, it is invoked in an exceptional form — the ratio of coastal lengths — which is only appropriate if certain conditions are fulfilled.

The role of proportionality is determined by the overall legal and geographical framework, and therefore the first condition must be that the reference to the lengths of the respective coasts is justifiable in terms of that framework. As the Court of Arbitration expressed the point in the Anglo-French case:

> "particular configurations of the coast or individual geographical features may, under certain conditions, distort the course of the boundary, and thus affect the attribution of continental shelf to each State, which would otherwise be indicated by the general configuration of their coasts. The concept of 'proportionality' merely expresses the criterion or factor by which it may be determined whether such a distortion results in an inequitable delimitation of the continental shelf as between the coastal States concerned. The factor of proportionality may appear in the form of the ratio between the areas of continental shelf to the lengths of the respective coastlines, as in the *North Sea Continental Shelf* cases. But it may also appear, and more usually does, as a factor for determining the reasonable or unreasonable — the equitable or inequitable — effects of particular geographical features or configurations upon the course of an equidistance-line boundary." (Decision, para. 100.)

The second condition of application, closely related to the first, is that equity must be reckoned within the same plane, and the requirement of equity is that one should compare like with like (*North Sea Continental Shelf* cases, *I.C.J. Reports 1969*, pp. 49-50, para. 91; Anglo-French case, Decision, para. 101; *Tunisia/Libya* case, *I.C.J. Reports 1982*, p. 76, paras. 104, 130).

In the *North Sea Continental Shelf* cases the Judgment of the Court (pp. 49-50, para. 91) stresses the existence of an equality within the same plane as between the three coastlines there in question. If I may quote that Judgment once again:

> "In the present case there are three States whose North Sea coastlines are in fact comparable in length and which, therefore, have been given broadly equal treatment by nature except that the configuration of one of the coast-

> lines would, if the equidistance method is used, deny to one of these States treatment equal or comparable to that given the other two." (*I.C.J. Reports 1969*, pp. 49-50, para. 91.)

It is to be noted that it is the comparability in length of the coastlines and the "broadly equal treatment by nature" which impressed the Court. It was a matter of abatement within "a geographical situation of quasi-equality" *(ibid.)*. The case was thus completely different from the present.

The more or less exceptional character of the ratio of coastal lengths as a proportionality test was given recognition by the Court in the Anglo-French case. In the words of the Court:

> "In particular, this Court does not consider that the adoption in the *North Sea Continental Shelf* cases of the criterion of a reasonable degree of proportionality between the areas of continental shelf and the lengths of the coastlines means that this criterion is one for application in all cases. On the contrary, it was the particular geographical situation of three adjoining States situated on a concave coast which gave relevance to that criterion in those cases. In the present case, the role of proportionality in the delimitation of the continental shelf is, in the view of this Court, a broader one, not linked to any specific geographical feature. It is rather a factor to be taken into account in appreciating the effects of geographical features on the equitable or inequitable character of a delimitation, and in particular of a delimitation by application of the equidistance method." (Decision, para. 99.)

The view of the Court in the Anglo-French case was well applied in practice. The French Government had invoked the argument based upon the ratio of coastal lengths both with reference to the Channel Islands region and in respect of the Atlantic region. In both respects the Court of Arbitration specifically rejected this form of the French argument. (Decision, paras. 98-101, 166, 195 *et seq.*, 246.)

The decision of this Court in the *Tunisia/Libya* case falls within the pattern set by the previous decisions. The Judgment applied the test of proportionality by reference to the lengths of the coastlines within the relevant area and this application was on the basis that the two coasts, and also the pertinent coastal fronts, were in fact comparable (*I.C.J. Reports 1982*, p. 91, paras. 130-131). As the Court made clear in its Judgment, "the only absolute requirement of equity is that one should compare like with like" (*ibid.*, p. 76, para. 104) and again "the essential aspect of the criterion of proportionality is simply that one must compare like with like" (*ibid.*, p. 91, para. 130).

What is lacking in the present case is precisely a comparability of the relevant coasts in legal terms. The principal geographical features, the coasts of Malta and the coasts of Libya, constitute the essential elements of the legal framework, standing opposite each other and abutting upon the areas of continental shelf dividing them.

### 7. *The Scale of Equitable Adjustment*

The general intellectual framework of the Libyan pleadings involves a dramatic choice between two contrasting methodologies. The choice appears to be between a solution based upon the method of equidistance and a solution deriving from criteria of distributive justice based upon coastal extent and the size of State territory. In the Libyan conception, small States litigate a great risk, since the stakes are high and delimitation is related to novel principles of legal radicalism. Mr. President, it is difficult to believe that the law of continental shelf delimitation is as radical, as revisionist, and as unstable as one is led to believe by the Libyan argument.

Even the departures from equidistance sanctioned by the Court in the *North Sea Continental Shelf* cases and the other decisions were designed precisely to maintain a policy of approximate equality in giving legal credit to the actual geography of the Parties. The policy of the law is conservative and it is based on recognition of the security and political interest of coastal States in respect of their adjacent submarine areas.

It must follow that the scale of equitable adjustment must be limited, since the presumption must be the equality of the relationship of coastal States. In legal terms the political and security aspects of coasts and the appurtenant submarine areas are not of variable significance and are no more susceptible to apportionment than shelf areas as such, with the natural resources they contain.

It is clear that the approach to delimitation revealed in the judgments of international tribunals is based upon the assumption that delimitation is a relatively marginal operation affecting a status quo based upon the inherent rights of the coastal State.

Thus in its Judgment in the *North Sea Continental Shelf* cases the Court explained the principle thus:

> "The continental shelf area off, and dividing, opposite States, can be claimed by each of them to be a natural prolongation of its territory. These prolongations meet and overlap, and can therefore only be delimited by means of a median line; and, ignoring the presence of islets, rocks and minor coastal projections, the disproportionally distorting effect of which can be eliminated by other means, such a line must effect an equal division of the particular area involved." (*I.C.J. Reports 1969*, p. 36, para. 57.)

The legal philosophy of the continental shelf, as expounded judicially, contains strong indications that delimitation is always a limited and conservative procedure rather than an extensive and radical procedure.

In the *North Sea Continental Shelf* cases the Court explained that:

> "the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the sea-bed and exploiting its natural resources" (*ibid.*, p. 22, para. 19).

The Court used that statement as the premise for an important conclusion and I quote again from the *North Sea Continental Shelf* cases:

> "It follows that even in such a situation as that of the North Sea, the notion of apportioning an as yet undelimited area, considered as a whole (which underlies the doctrine of the just and equitable share), is quite foreign to, and inconsistent with, the basic concept of continental shelf entitlement, according to which the process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or other of the States affected. The delimitation itself must indeed be equitably effected, but it cannot have as its object the awarding of an equitable share, or indeed of a share, as such, at all, — for the fundamental concept involved does not admit of there being anything undivided to share

> out. Evidently any dispute about boundaries must involve that there is a disputed marginal or fringe area, to which both parties are laying claim, so that any delimitation of it which does not leave it wholly to one of the parties will in practice divide it between them in certain shares, or operate as if such a division had been made. But this does not mean that there has been an apportionment of something that previously consisted of an integral, still less an undivided whole" (*I.C.J. Reports 1969*, pp. 22-23, para. 20.)

This view was endorsed by the Court of Arbitration in the Anglo-French case (Decision, paras. 78 and 245).

Mr. President, the idea that the process of delimitation involves an operation which is limited in scale is reinforced by the principle of non-encroachment, which is really an outwork of the concept of a legal or effective equality which reflects the geographical facts. No delimitation can be equitable if it results in a cut-off effect. It follows that the criterion of proportionality, like the method of equidistance, is controlled by the concept of effective equality and this was pointed out by the Court of Arbitration in the Anglo-French case (Decision, para. 101).

The presumption that the process of delimitation is limited in scope is also strengthened by the fact that "the geographic correlation between coast and submerged areas off the coast is the basis of the coastal State's legal title", as this Court stated in its Judgment in the *Tunisia/Libya* case. The Court there continued:

> "As the Court explained in the *North Sea Continental Shelf* cases the continental shelf is a legal concept in which 'the principle is applied that the land dominates the sea' (*I.C.J. Reports 1969*, p. 51, para. 96)". (*I.C.J. Reports 1982*, p. 61, para. 73.)

It follows from these premises that the boundary which accords with equitable principles and legal policy always aims, however approximately, at an equal attribution of shelf areas to coastal States. None of the key statements of principle are qualified by reference to territorial magnitude or the length of coasts. The procedure of delimitation is conditioned by the basically equal relationship of all coastal States. The scale of modification of the primary delimitation, as determined by the major geographical features when such modification is necessary, is always within a limited compass.

In the present case the Libyan claim involves a massive encroachment upon shelf areas legally appurtenant to the coasts of Malta. The Libyan claim, as formulated in the submissions appended to the Libyan Reply, involves a radical inequality as between the Parties and calls for a delimitation procedure substantially outside the controlling conditions set by the legal principles governing the attribution and delimitation of areas of continental shelf.

### *8. Proportionality Is Not a General Principle Providing an Independent Source of Rights*

In the Anglo-French case the Court of Arbitration emphasized that proportionality was not to be used "as a general principle providing an independent source of rights to areas of continental shelf" (Decision, para. 101, and see also para. 246). The reason for this was given by the Court:

> "there can never be a question of completely refashioning nature, such as by rending the situation of a State with an extensive coastline similar to that of

> a State with a restricted coastline; it is rather a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations or features in situations where otherwise the appurtenance of roughly comparable attributions of continental shelf to each State would be indicated by the geographical facts" (Decision, para. 101).

The Libyan claim to a very high proportion of the Pelagian Block, to a virtual monopoly of the submarine areas dividing the Parties, must involve reliance upon proportionality as an independent source of rights.

The claim is formulated alongside, but also independently of, the argument based upon natural prolongation. The proportionality argument is autonomous and forms an important aspect of the Libyan submissions.

The fact that the argument is used in isolation from the actual geography must make it suspect at the outset. The formula based on lengths of coasts completely ignores the geographical framework and the requirement of comparability. The entire purpose of the Libyan argument is to give Libyan coasts more legal significance in terms of attribution than those of Malta.

⑨㉗ If the graphic representations of the Libyan claim are examined (LM, Maps 9
㉙㉚ and 17; LR, Maps 10, 11, 12 and 13) and I refer the Court respectfully once more
⑤㊹ to Malta's Illustrations: Figure 1, which shows the 1973 Libyan proposal and Figure 13, which shows the so-called Rift Zone and the axial ridge line as identified by Libya — if one looks at those graphic representations of the Libyan claim, it is immediately apparent that proportionality is being used as a major source of attribution, since the scale of the move away from the normal equality of seaward reach of jurisdiction is redolent of a major principle of attribution rather than an ancillary principle of equitable adjustment which is not an independent source of rights. The fact is that Libya seeks to use proportionality not as an instrument of equity and approximate equality but as a primary source of claim.

The Libyan claim not only fails to observe the principle that adjustment can only take place within a framework of geographical comparability — that one should compare like with like — but it would succeed in rendering the unlike even more so, since the consequences of the difference in size between the Parties would be greatly exaggerated, and this without any justification.

The practical and political consequences of the Libyan arguments in this case, were they to succeed, would be very unfortunate. It goes without saying that disputes concerning maritime delimitation are normally settled by negotiations. Article 83 of the Law of the Sea Convention expressly provides (in its first paragraph) that

> "the delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law . . . in order to achieve an equitable solution".

If the principle of territorial magnitude and ratio of coastal lengths as a major source of rights were to be given currency, the settlement of disputes by negotiation would become much more difficult. The Libyan approach would substitute a geopolitical system of attribution for the existing procedure based upon the equality of the significance of coastal States in matters of attribution and delimitation.

### *9. The Inappropriateness of the Libyan Version of Proportionality as an Instrument of Equity: the Jurisprudence*

Mr. President, there is another perspective in which the Libyan version of proportionality may be examined. The general tendency of the Libyan case is to discredit the method of equidistance *tout court*. The impression which is received from the Libyan pleadings is that not only equidistance, but also the very concept of approximate equality in matters of delimitation must be discarded. In place of approximate equality, and the principle of not refashioning geography, the Libyan side would put the concept of natural prolongation (in its own interpretation) and the concept of territorial magnitude and the ratio of lengths of coasts.

The Libyan argument thus constitutes a frontal assault not only on the method of equidistance but also on the idea of approximate equality based upon the actual geographical circumstances of the particular case. I have sought to show the various ways in which the Libyan thesis based upon the ratio of the lengths of coasts runs counter to legal principle and sound policy.

The eccentricity of this thesis may now be seen by reference to the leading cases on continental shelf delimitation, which confirm the general equality of the seaward extension of the sovereign rights of coastal States in respect of both submarine areas appertaining to adjacent coasts and submarine areas off opposite coasts.

The cases involve important examples of adjacent or partly adjacent coasts and it is a striking fact that, even in situations of adjacency, the test of proportionality is not applicable in the mode on which the Libyan argument relies. The fact is that the cases are not inimical to the concept of equality of coasts and the reservations which the jurisprudence contains concerning the equidistance method are precisely motivated by the need to maintain an approximate equality in the process of delimiting shelf areas.

I turn first to the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 3). The facts of this case, the Court will be aware, involved three adjacent States in a situation in which, but for the concavity of the German coast, the three States had been given more or less equal treatment by nature. As the Court expressed the matter:

> "What is unacceptable in this instance is that a State should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline is roughly convex in form and in the other it is markedly concave, although those coastlines are comparable in length." (*Ibid*., p. 50, para. 91.)

The entire object of the Court as explained very clearly in the Judgment was to maintain equality when there was in geographical terms a "situation of equality within the same order" *(ibid.)*. The Court set aside the equidistance method precisely because in the circumstances the result would deny to one of the three States concerned "treatment equal or comparable to that given the other two" *(ibid.)*.

The *North Sea Continental Shelf* cases are of particular relevance, of course, since the Court there invoked proportionality in a form similar to the version invoked by Libya in the present case. And yet, Mr. President, the reasons which moved the Court to criticize the equidistance method in the *North Sea Continental Shelf* cases are fundamentally opposed both to the substance and to the philosophy of the arguments advanced by Libya in the present case.

In the *North Sea Continental Shelf* cases the Court was using the medium of natural prolongation, and the principle that the land dominates the sea and generates entitlement to shelf rights *ipso facto* and *ab initio*, to express a practical view on delimitation which took the form of the principle of non-encroachment.

The principle of non-encroachment involved recognition of the equality of the seaward reach of coastal States and was based upon the legal concept of natural prolongation as the basis of title to adjacent shelf areas. It may be noted that in the *dispositif* in the *North Sea Continental Shelf* cases proportionality had a low normative status as a "factor to be taken into account", whereas the principle of non-encroachment features as the first in the recital of "principles and rules applicable to the delimitation".

The Judgment in the *North Sea Continental Shelf* cases was much concerned with the problem of cut-off — that is, of encroachment laterally on the coastal front of another State — which in certain situations is exacerbated by the method of equidistance (*I.C.J. Reports 1969*, p. 31, paras. 43-44; pp. 34-37, paras. 51-59; pp. 46-47, para. 85; p. 49, para. 89). It was this problem which caused the Court to formulate the principle of non-encroachment (*ibid.*, pp. 46-47, para. 85), and to criticize the role of equidistance in certain situations.

However, the Court expressly acknowledged that in the case of opposite States the problem of encroachment does not arise from the use of the method of equidistance, and in that case delimitation can only be by means of a median line which "must effect an equal division of the particular area involved" (*ibid.*, p. 36, para. 57; and see also para. 58). The Libyan argument in the present case, and the type of alignment it involves, is completely incompatible with the reasoning of the Court in the *North Sea Continental Shelf* cases. Libya is seeking to legitimate encroachment on a very substantial scale and the Court can verify ⑤ that assertion by looking at Figure 1 and the 1973 proposal. The claim reaching to within 15 miles of Malta involves cut-off of a high order, even although the relationship is one of opposite rather than adjacent coasts.

So much for the *North Sea Continental Shelf* cases, and I can now move on to the Decision of the Court of Arbitration in the Anglo-French case. Once again, the reasoning contradicts the argument which Libya offers. The approach of the Court of Arbitration, with particular reference to the Atlantic region, was based on a concept of proportionality — and its close relative "distortion" — and the objective was to maintain an equality of seaward reach of the mainlands of the two States as they abutted upon the submarine areas of the region.

It is of interest to recall that the Court regarded the coastal relationship of the United Kingdom and France as "one analogous to that of adjacent States" beyond the point where the coasts were geographically opposite one another (Decision, para. 242; and see also paras. 233, 241).

The Court applied the equidistance method on the basis that it produced a solution appropriate to the balance of geographical circumstances of the Atlantic region. The issue of the effect to be given to Ushant and the Scilly Isles was seen exclusively in terms of the modification, not the abolition, of the equidistance method. The Court expressly stated that but for the distorting effect of the Scilly Isles, "the line equidistant from the coasts of the two States would otherwise constitute the appropriate boundary" (Decision, paras. 248, 249). To the Court the equidistant line between the mainlands of the United Kingdom and France represented equity, subject to the technique — on a modest scale — of abating inequities caused by particular geographical features (Decision, paras. 249-251).

The issue of proportionality was seen by the Court of Arbitration exclusively in terms of the small-scale modification of the equidistance line in order to abate the inequitable effects of "the distorting geographical feature", that is to say, the Scilly Isles. The purpose of the exercise was to maintain a legal equality between the mainlands of the United Kingdom and France. No reference was made to the lengths of coasts except by way of a rejection of a French argument based upon the lengths of coasts within the Channel (Decision, para. 246).

Next I shall turn to the decision of the Court in the *Tunisia/Libya* case. Here again no support can be found for the type of proportionality argument deployed by Libya in the present proceedings. The primary objectives of the Court in the

*Tunisia/Libya* case were to avoid any undue encroachment upon the shelf areas adjacent to the Libyan coast as a result of changes in the configuration in the Tunisian coast (*I.C.J. Reports 1982*, pp. 86-89, paras. 122-129), and, in addition, to give appropriate weight to the conduct of the Parties and to the *de facto* maritime limit. The Court did not use the equidistance method and of course neither Party had pleaded equidistance. However, the procedure of delimitation had the clear purpose of maintaining equality as between the Parties in somewhat complicated geographical circumstances.

The Court applied "the test of proportionality as an aspect of equity" (*ibid.*, p. 91, paras. 130-131) in relation to a delimitation which the Court had already established on the basis of the various other relevant circumstances. There is no evidence in the Judgment that proportionality played a dominant role in the delimitation process. Whilst it is true that the element of proportionality appears in the *dispositif* as a "relevant circumstance" (*ibid.*, p. 93), it is fifth and last in the order of the relevant circumstances listed, and apart from a brief reference in the discussion of Tunisian baselines (*ibid.*, p. 76, para. 104) the subject of proportionality is only taken up at the very end of the Judgment (*ibid.*, p. 91, paras. 130-131). The Court there refers to proportionality explicitly as a test and "as an aspect of equity", that is to say, as a means of evaluating the attribution of shelf areas "following the method indicated by the Court" (*ibid.*, para. 131). Moreover, the test of proportionality was applied, it is to be presumed, on the basis that the two coasts in the second sector of the delimitation were in principle comparable. As in the case of the Atlantic region in the context of the Anglo-French case, the procedure was then to find ways of abating the eccentricities of coastal configuration. This was in effect the procedure adopted, *mutatis mutandis*, in the Judgment of the Court in the *Tunisia/Libya* case (*I.C.J. Reports 1982*, pp. 82, 85-89, paras. 114-115, 121-129; *dispositif*, pp. 93-94, para. 133, C (3)). Moreover, in respect of the second sector the Court stated that:

> "The major change in direction undergone by the coast of Tunisia seems to the Court to go some way, though not the whole way, towards transforming the relationship of Libya and Tunisia from that of adjacent States to that of opposite States, and thus to produce a situation in which the position of an equidistance line becomes a factor to be given more weight in the balancing of equitable considerations than would otherwise be the case." (*Ibid.*, p. 88, para. 126.)

And finally, I come to the decision of a Chamber of this Court in the *Gulf of Maine* case. In that case the first segment of the delimitation involves a coastal relationship of lateral adjacency. However, away from the international boundary terminus and approaching the outer opening of the Gulf, the geographical relationship becomes one of frontal opposition with a marked quasi-parallelism (*I.C.J. Reports 1984*, p. 325, paras. 188-189). In respect of the second segment of the delimitation, the Chamber stated that geography prescribed "that the delimitation line should rather be a median line (whether strict or corrected remains to be determined) for delimitation as between opposite coasts . . ." (*ibid.*, p. 331, para. 206).

The reasoning of the Chamber is insistent that in the case of opposite coasts a median line reflects the geographical facts and also gives effect to "the equitable criterion, so abundantly endorsed by the Chamber, of the equal division — so far as feasible — of areas where the maritime projections of the coasts of the two States overlap" (*ibid.*, p. 334, paras. 216-217).

However, the Chamber found it necessary to apply to the median line as initially drawn what it called a correction which "though limited" would take account of the fact that "the back of the Gulf is entirely occupied by the continuous coast of Maine, i.e., a component state of the United States" (*I.C.J. Reports 1984*, p. 334, para. 218). The difference in length between the respective coastlines of the two Parties in the delimitation area was regarded by the Chamber "a special circumstance of some weight" (*ibid.*, p. 322, para. 184) and the ratio between the coastal fronts was applied as an *ad hoc* method of effecting the appropriate correction to the median line (*ibid.*, p. 336, para. 222).

The Chamber was careful to explain its *modus operandi* and it is abundantly clear that it has little in common with the *modus operandi* contended for by Libya in the present case. The reference to the difference in coastal lengths did not constitute a basis for the settling of a delimitation but was a ground for the correction of a delimitation established initially on the basis of other criteria (*ibid.*, p. 323, para. 185).

The Chamber emphasized in two separate passages — paragraphs 185 and 218 — of the Judgment that the extent of the respective coasts of the Parties did not constitute a criterion or method of delimitation. Moreover, in the same two passages the Chamber stated that it had no intention of making "an autonomous criterion or method of delimitation out of proportionality" — I refer to paragraph 218 and this refers back to paragraph 185 of the Judgment of the Chamber.

The thinking of the Chamber is expressed with particular clarity in the following passage:

> "The Chamber's views on this subject may be summed up by observing that a maritime delimitation can certainly not be established by a direct division of the area in dispute proportional to the respective lengths of the coasts belonging to the parties in the relevant area, but it is equally certain that a substantial disproportion to the lengths of those coasts that resulted from a delimitation effected on a different basis would constitute a circumstance calling for an appropriate correction." (*Ibid.*, p. 323, para. 185.)

What took place was thus an adjustment of a median line which was itself the result of the equitable criterion selected by the Chamber, that is to say, the principle of equal division of the area of overlapping of the maritime projections of the coasts of the two States. As a matter of a formulation of principle, the approach of the Chamber is entirely unlike the dogmatic reliance upon the ratio of coastal lengths to be found in the Libyan arguments in the present case.

And yet apart from the question of the *modus operandi* and the criteria applicable, it may be noted that the occasion for the correction of the median line in the main segment of the delimitation was an unusual conjunction of politics and geography, involving a rectangular stretch of water with a land boundary terminus at the corner of this rectangle.

The Chamber was seeking to apply the concept of equality *mutatis mutandis* to the particular geographical and political circumstances, and in the result all the geographical features were in principle given full effect, including even the Cape Cod peninsula. Even Seal Island, a very minor feature, was given half effect. The median line was adopted, as the basis of the delimitation between opposite coasts, subject only to an element of correction.

The decision in the *Gulf of Maine* case thus stands in the line of jurisprudence which has worked out the concept of approximate equality in relation to different conjunctions of geography and politics. The centre of the reasoning of the Chamber is occupied by the concept of equality, and thus the philosophy of the decision, like its predecessors, is inimical to the approach of Libya in this case.

Mr. President, the four decisions I have reviewed provide a *modus operandi* for the construction in varied circumstances of a régime of legal equality between coastal States abutting upon the same continental shelf. The equitable principles and factors presented by the jurisprudence constitute a code for the maintenance of an approximate equality of coastal States. The *modus operandi* offered by the Libyan side in this case finds no place in that code.

Having surveyed the jurisprudence, I shall now turn to an examination of the pertinent State practice.

### *10. The Concept of Proportionality: the Evidence of State Practice*

By way of preface, it may be observed that the Libyan view of proportionality in this case is strongly contradicted by the general practice of States in continental shelf delimitation and it is not at all surprising that the Libyan pleadings exhibit a fear of State practice. Indeed, the Libyan pleadings contain what are virtually blanket denials of the relevance of State practice, as, for example, in the Counter-Memorial (**II**, LCM, para. 5.96), where it is stated that "if State practice demonstrates anything therefore, it is that each case has its own unique setting and its own peculiar facts".

In the *Tunisia/Libya* case the Court remarked that: "the concept of natural prolongation . . . was and remains a concept to be examined within the context of customary law and State practice" (*I.C.J. Reports 1982*, p. 46, para. 43), and in the same connection the Court referred to "the actual practice of States which is expressive, or creative, of customary rules". It is obvious that any concept of the law of the sea may be examined "within the context of customary law". Not surprisingly Governments and their legal advisers take great trouble to monitor State practice on maritime delimitation and it is unusual for pleadings to ignore such material. The course of lectures given at the Hague Academy in 1981 by Dr. Jagota, the Legal Adviser to the Ministry of External Affairs of India, on the subject of maritime boundaries, makes very substantial use of State practice (*Recueil des cours*, Vol. 171 (1981-II), p. 83), and this is surely to be expected.

But, of course, whilst the general relevance of State practice may be undoubted, the individual items of State practice must be carefully evaluated. It is not normal for agreements relating to continental shelf delimitation to make express reference to the precise legal and political elements which lie behind the alignment established, but it is not uncommon for the preamble of such agreements to refer to the fact that the delimitation has been established "in accordance with international law". Not atypical in this respect are the agreements creating continental shelf boundaries between Iran, a long-coast State with an extensive land territory, and short-coast States opposite Iran (Malta Illustrations, Fig. 22).

The relevant agreements in chronological order were as follows:

*First*, between Iran and Saudi Arabia, signed in 1968 (ratified on 29 January 1969; **II**, LCM, Annex of Delimitation Agreements, No. 17).

*Second*: between Iran and Qatar, signed in 1969 (ratified on 10 May 1970; MCM, Annexes, **II**, p. 416; **II**, LCM, Annex of Delimitation Agreements, No. 21).

*Third*: between Iran and Bahrain, signed in 1971 (ratified on 14 May 1972; **I**, MM, Annexes, p. 66; **II**, LCM, Annex of Delimitation Agreements, No. 25).

*Fourth*: between Iran and Oman, signed in 1974 (ratified on 28 May 1975; MCM, Annexes, **II**, p. 416; **II**, LCM, Annex of Delimitation Agreements, No. 40).

*Fifth*: between Iran and the United Arab Emirates signed in 1974 (not yet ratified; **II**, LCM, Annex of Delimitation Agreements, No. 42).

Each of these agreements is furnished with a preamble, containing a recital which makes explicit reference to the application of international law.

The agreement between Iran and Saudi Arabia contains the following recitals:

> "Desirous further of determining in a just and accurate manner the boundary line separating the respective submarine areas over which each party is entitled by international law to exercise sovereign rights,
>
> Now therefore and with due respect to the principles of law and particular circumstances, . . ."

The other four agreements include preambles with an identical considerandum as follows:

> "Desirous of establishing in a just, equitable and precise manner the boundary line between the respective areas of the continental shelf over which the Parties have sovereign rights in accordance with international law."

Even in cases in which no express reference is made to international law there is a presumption that such delimitation agreements are based upon legal principles.

It goes without saying that the various agreements make no particular reference to the factor of proportionality, and it is obvious that the precise course of the alignment in each case will be affected by the geographical circumstances of that case and certain elements of political compromise.

None the less the general pattern of agreements relating to comparable geographical circumstances surely constitutes reliable evidence of the practice of States in the actual application of the matrix of equitable principles, relevant circumstances and factors, in the process of delimitation.

The practice need not be seen as evidence of a particular rule of customary law, but it must provide significant and reliable evidence of normal standards of equity. The practice constitutes an international and objective standard of equity and of what is generally accepted as "approximate equality" in matters of shelf delimitation. Such a standard is also *ex hypothesi* relevant to the concept of proportionality.

*The Court rose at 12.55 p.m.*

## FIFTEENTH PUBLIC SITTING (3 XII 84, 3 p.m.)

*Present:* [See sitting of 26 XI 84.]

Professor BROWNLIE: Mr. President, before the recess for lunch I had moved on to the relevance of State practice as providing evidence of the international objective standard of equity in matters of shelf delimitation, and in that way being also a standard as to what is accepted by States generally as an approximate equality in matters of shelf delimitation.

Malta has set out the relevant State practice in her written pleadings (**I**, MM, paras. 184-195; **II**, MCM, paras. 252-256), and it is of course not necessary to rehearse the material in full. We have also analysed the Libyan treatment of State practice in our Reply (*supra*, MR, paras. 234-270; and Annex 4).

However, with your permission, I would like to point up certain aspects of the State practice. By way of preface I would respectfully remind the Court of the point of reference. The point of reference would seem to be a situation in which a long-coast State claims a high proportion of the submarine areas dividing it from an opposite short-coast State, whether that short-coast State is an island or not. In the Libyan Memorial it is stated "that a boundary within the Rift Zone would leave to each of the Parties areas of shelf within the relevant area that bear a ratio to each other of between 1:8 and about 1:12" (**I**, LM, para. 10.18).

No support can possibly be found in the practice of States for such a dramatically unequal partition of shelf areas, either of shelf areas dividing opposite States or shelf areas dividing States with other types of coastal relationship.

Four types of evidence may be pointed out. In the first place, the existing patterns of delimitation in semi-enclosed seas provide substantial contradiction of the Libyan view of proportionality in the present case. I would respectfully refer the Court to certain figures in Malta's dossier: Figures 19, 21, 22 and 24. Figure 19 illustrates the existing shelf delimitations in the Baltic Sea; Figure 21 the existing delimitations in the Mediterranean; Figure 22 the delimitations of shelf areas in the Gulf; and Figure 24 the existing continental shelf delimitation between the Soviet Union and Turkey in the Black Sea.

Secondly, there is the practice involving long-coast States and island States in an opposite relationship, and such practice is clearly based upon a principle of equality and the method of equidistance.

The relevant delimitations of this class include the following:

Bahrain and Iran (**I**, MM, Annexes, p. 66; **II**, LCM, Annex of Delimitation Agreements, No. 25) (Malta Illustrations, Fig. 22);

Cuba and Mexico — Mexico is the long-coast State (**I**, MM, Annexes, p. 68; **II**, LCM, Annex of Delimitation Agreements, No. 47) (Malta Illustrations, Fig. 23);

India and the Maldives (**I**, MM, Annexes, p. 70; **II**, LCM, Annex of Delimitation Agreements, No. 49) (Malta Illustrations, Fig. 28);

Cuba and the United States (as the long-coast State) (**I**, MM, Annexes, p. 72; **II**, LCM, Annex of Delimitation Agreements, No. 53) (Malta Illustrations, Fig. 23);

Colombia, the long-coast State, and the Dominican Republic (**I**, MM., Annexes, p. 74; **II**, LCM, Annex of Delimitation Agreements, No. 54) (Malta Illustrations, Fig. 23);

Colombia, the long-coast State, and Haiti (**I**, MM, Annexes, p. 77; **II**, LCM, Annex of Delimitation Agreements, No. 55) (Malta Illustrations, Fig. 23);

Again Bahrain and Saudi Arabia (**I**, MM, Annexes, p. 85; **II**, LCM, Annex of Delimitation Agreements, No. 5) (Malta Illustrations, Fig. 22).

Then I come to the third class of practice, that is agreements effecting delimitations between long-coast States and short-coast peninsular States opposite the long-coast States. Such delimitations are on the basis of the method of equidistance and the relevant delimitations are as follows:

The delimitation between Denmark and Norway, Denmark as the peninsular State opposite Norway (MCM, Annexes, **II**, p. 416; **II**, LCM, Annex of Delimitation Agreements, No. 12) (Malta Illustrations, Fig. 20);

Iran, the long-coast State, and Qatar as the short-coast peninsular opposite (MCM, Annexes, **II**, p. 416; **II**, LCM, Annex of Delimitation Agreements, No. 21) (Malta Illustrations, Fig. 22);

And then again Iran and Oman as the peninsular State opposite Iran (MCM, Annexes, **II**, p. 416; **II**, LCM, Annex of Delimitation Agreements, No. 40) (Malta Illustrations, Fig. 22);

Australia (in respect of the Yorke Peninsula and so in that respect Australia is the peninsular short-coast State) opposite Papua New Guinea (which in that situation is the long-coast State) (MCM, Annexes, **II**, p. 416; **II**, LCM, Annex of Delimitation Agreements, No. 60) (Malta Illustrations, Fig. 31).

Fourthly, there are those delimitations between groups of islands, which groups are in some cases more or less autonomous, and the mainlands of opposite-related long-coast States. The relevant cases, I submit, have a strong similarity of geographical circumstance to the relation of Malta and Libya, and the delimitations all reflect the concept of equality.

The delimitations concerned are those between:

Denmark (in respect of the Faroes group) and Norway as the long-coast State (**I**, MM, Annexes, p. 51; **II**, LCM, Annex of Delimitation Agreements, No. 62) (Malta Illustrations, Fig. 29);

Finland (in respect of the Åland Islands which belong to Finland) and Sweden as the long-coast State (*Limits in the Seas*, US Dept. of State, No. 71; **II**, LCM, Annex of Delimitation Agreements, No. 31) (Malta Illustrations, Fig. 32);

France (in respect of New Caledonia) and Australia as the long-coast State opposite (**I**, MM, Annexes, p. 203; **II**, LCM, Annex of Delimitation Agreements, No. 71) (Malta Illustrations, Fig. 33);

Norway as the long-coast State and the United Kingdom (in respect of the Shetland Islands) (**I**, MM, Annexes, p. 195; **II**, LCM, Annex of Delimitation Agreements, No. 8) (Malta Illustrations, Fig. 34);

Then two delimitations involving India:

India (in respect of the Nicobar Islands) and Indonesia (Agreements of 1974 and 1977) (**II**, LCM, Annex of Delimitation Agreements, No. 41) (Malta Illustrations, Fig. 35);

India (again also in respect of the Nicobar Islands) and Thailand as the long-coast State (**I**, MM, Annexes, p. 201; **II**, LCM, Annex of Delimitation Agreements, No. 59) (Malta Illustrations, Fig. 36).

In this particular connection, of island groups opposite long coasts, it is useful to recall that the United Kingdom and France have agreed that, in principle, the maritime boundary between the Channel Islands and the neighbouring coasts of the French mainland should be the median line (see the Anglo-French Arbitration, Decision of 30 June 1977, para. 22).

Mr. President, I submit that the only possible conclusion is that the State practice effectively demonstrates that a delimitation in accordance with the Libyan thesis on proportionality would be wholly incompatible with the international standard as to what is equitable and what accords with the legal concept of approximate equality.

The Libyan pleadings do not seek to make out a positive argument based upon State practice to support the Libyan view on proportionality. The tactics of our distinguished opponents are founded upon two simple and essentially negative elements: first, the general denial of the relevance of State practice; and, second, an assault on the State practice invoked by Malta in the written pleadings.

Of course, given the dogmatic Libyan view that State practice is irrelevant *tout court*, such an assertion should preclude resort to State practice by the other side. And in general the Libyan pleadings have eschewed practice. Thus, for example, the section of the Libyan Reply entitled "Proportionality in Practice" (*supra*, LR, pp. 90-93) is not concerned with State practice at all.

However, with a certain inconsistency, the Libyan Counter-Memorial (**II**, LCM, para. 6.15) makes a passing reference to the Franco-Spanish Agreement of 1974 (**II**, LCM, Annex of Delimitation Agreements, No. 34), one of the few pieces of State practice to fall under the notice of that written pleading. The Libyan pleading there states that:

> "Even with an equitable or 'adjusted' equidistance line, between adjacent States, the differences in coastal length may cause a diversion in the line (as with the Franco-Spanish Agreement of 1974)."

Moreover, in the Annex of Delimitation Agreements forming part of the Libyan Counter-Memorial, the commentary upon the Franco-Spanish Agreement relies upon the analysis of the Geographer of the Department of State (*Limits in the Seas*, No. 83, p. 13). The analysis states that:

> "the second segment of the Franco-Spanish continental shelf boundary was negotiated according to equitable principles relating to the ratio of the artificial coastlines of the two States".

This statement is not given a source in the text of the *Limits in the Seas* item. However, the source would appear to be an article by Professor José Luis de Azcárraga (*Revista española de derecho internacional*, Vol. 28, pp. 131-138), which is reproduced and translated in the United States Counter-Memorial in the *Gulf of Maine* case (Vol. IV, Ann. 10, App. A[1]). This article is a personal assessment of the negotiations of the continental shelf agreement relating to the Bay of Biscay and it makes clear that a number of factors other than the lengths of coasts influenced the delimitation. In particular, the article points to the special circumstances arising from the topography of the sea-bed and the fact that France's more extensive continental shelf "dominated the negotiations" (*Revista española de derecho internacional*, p. 133; translation[1]).

In any case the coastal relationships in the Bay of Biscay are unlike those of Malta and Libya and seaward *beyond the Point R* of the Franco-Spanish delimitation the shelf is divided into two distinct areas. As Professor José Luis de

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[1] Not reproduced. For reference see *I.C.J. Pleadings, Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. IV, p. 458. *[Note by the Registry.]*

Azcárraga expresses the matter: "the line joining Points R and T . . . is virtually the median line equidistant between the isobath curves at equal depths" (*Revista española de derecho internacional*, p. 132; United States Counter-Memorial, Vol. IV, Ann. 10, App. A). In the segment landward of Point R, that is to say, the sector reaching from the territorial sea to the foot of the continental slope, the Parties adopted the equidistance method in its normal form.

In the result the delimitation in the Franco-Spanish Agreement has little or no relevance for present purposes and the Libyan pleadings have signally failed to produce any State practice which provides support for the application of the test of proportionality, in the form of the ratio of coastal lengths, to geographical circumstances comparable with those of the present case.

### *11. Coastal Relationships in Semi-Enclosed Seas*

The evidence of State practice leads naturally to a consideration of the general significance of the Libyan thesis in the context of semi-enclosed seas.

The existing practice in the Baltic and the Gulf provides no support whatsoever to the Libyan position in the present case. The patterns of delimitation in both the Baltic and the Gulf flatly contradict the thesis that the length of coasts or overall territorial magnitude generate special advantages when it comes to delimitation of the continental shelf.

Moreover, the system implied in the Libyan argument is contradicted by logic and ordinary political sense.

㉛ If the simple model presented in Figure A (Malta Illustrations, Fig. 27A) is examined, the strange consequences of the Libyan thesis immediately appear. According to the Libyan argument the advantages of length of coast and territorial magnitude are absolute and are not relative to the actual number of opposite coastal States. Moreover, general reference to the rights of third States does not ㉛ resolve the difficulty which is revealed by Figure A, since the question remains, always, what are the rights of the States on the opposite coast?

The Libyan contention is that a large landmass behind the coasts produces a natural prolongation of greater intensity. As it is expressed in the Libyan Counter-Memorial (**II**, LCM, para. 2.48): "The land territory behind Libya's extensive coast is immense, whereas both the coast and land territory of Malta are very small." And the conclusion then follows: "Surely, the intensity of the natural prolongation must be greater — the prolongation, more natural — from the Libyan coast in arriving at a line of delimitation?" (*Ibid.*)

The logic of the Libyan argument is such that it applies to all the short-coast States jointly as much as it applies to a single short-coast State opposite to the ㉛ long-coast State 1 in Figure A. The Libyan argument for special advantage is not conditioned by the existence of a single short-coast State opposite and the Libyan position thus stands quite simply for the dominance of the shelf areas of a semi-enclosed sea or gulf by a long-coast State. This result which is visible on ㉛ Figure A provides further evidence of the divorce between equitable principles and the doctrine now proposed by Libya as a version of proportionality.

Mr. President, the logic of the Libyan reasoning based upon the ratio of length of coasts and territorial magnitude must be applicable equally to the case of one short-coast State and to the case of several short-coast States in an opposite relationship to State 1 on that figure. When there is only one short-coast State opposite, naturally the consequences will vary but the nature of the variation does not ㉛ fundamentally affect the issue as presented graphically on Figure A.

### *12. The Coincident Results of Proportionality and the Principle of Natural Prolongation in the Libyan Argument*

I come now to the last of the bountiful crop of logical difficulties presented by the Libyan argument based upon proportionality.

Both in the submissions and generally in the written pleadings (**I**, LM, ⑨ para. 6.90; Map 17 (following p. 160); *supra*, LR, paras. 7.15-7.17), the Libyan argument involves an assertion that the principle of natural prolongation and the concept of proportionality produce a coincident result, namely a line somewhere within the so-called Rift Zone.

Even if, which Malta would deny, natural prolongation in the Libyan version were relevant to the delimitation in the present case, the coincidence can have no legal significance. There can be no logical connection between the ratio of the lengths of coastlines and the incidence of geological and geomorphological features in and under the sea-bed. This is not to say that such coincidence automatically disqualifies the two factors which produce the coincident result: but unless there is some legally significant connection between the two factors the coincidence as such cannot increase the independent legal weight, whatever that might be, of the two factors taken singly.

The situation involves the use by Libya of a particular version of proportionality which makes reference to the lengths of the respective coasts or at least of selected coasts. This criterion of proportionality operates on its own plane and clearly has no logical and therefore no legal or equitable relation to the geology of the sea-bed areas dividing the Parties or to the legal question of natural prolongation. Still less does it have any connection with the extent of the Libyan landmass, which is also related to the principle of natural prolongation in the Libyan pleadings (**II**, LCM, para. 2.48).

It must follow that the coincidence of result between the proportionality criterion as proposed by Libya and the principle of natural prolongation is entirely artificial and cannot involve any mutual confirmation. The matter can be expressed even more simply: the physiography of the sea-bed has no logical connection either with the lengths of the coasts of the two Parties or with the ratio of the difference of those lengths. For that matter, the physiography of the sea-bed in the Rift Zone has no connection with any linear value such as the latitudinal reach of Libya or the length of the coast from the Tunisian frontier to Ras Zarruq.

### *13. Conclusion on Proportionality*

Mr. President, Members of the Court, I can now present a summary of conclusions on the issues relating to proportionality.

1. The first conclusion is the most important. The equitable solution must be found within the actual geographical framework and within this framework is to be found the "balance of geographical circumstances". This balance is not related to proportionality as an independent factor but reflects the geographical circumstances overall and is translated in legal terms as a concept of approximate or legal equality.

2. The purpose of the law concerning shelf delimitation is to maintain an equality of seaward reach of jurisdiction and to avoid a delimitation which causes encroachment upon the continental shelf areas adjacent to the coastal front of another State.

3. It follows that proportionality cannot be invoked in order to justify a delimitation or a method of delimitation which involves a monopoly or preponderance of jurisdictional reach to the advantage of one State as against another State abutting upon the same areas of shelf.

4. The test of proportionality cannot have any radical effects upon the delimitation since the judicially evolved approach to delimitation rests upon the assumption that delimitation is an operation of limited scale. In other words, it is a relatively limited or marginal operation affecting a status quo based upon the inherent rights of the coastal State as generated by its sovereignty over land territory.

5. The ratio of coastal lengths as a test of proportionality is inappropriate to the geographical framework of the present case and appears consequently as an argument to support a manifestly inequitable solution, since there is no equality within the same plane.

6. The length of coasts and the ratio of the different lengths represent an abstraction which is not based upon the actual geography and coastal relationships of the Parties: such criteria cannot reflect the geographical framework and would necessarily involve a radical apportionment of the submarine areas dividing the Parties. The result of resort to the Libyan criteria would be to provide a substitute for the geographical data in this case.

7. The State practice relating to comparable situations clearly demonstrates the international standard in the practice of continental shelf delimitation, that is to say, the objective standard of what is equitable and the State practice is clearly incompatible with the view of proportionality advanced by Libya in these proceedings.

8. The Libyan position, based as it is upon the criteria of coastal length and territorial magnitude, produces a result which would be wholly inequitable, not only in the present case but generally in the situation of long-coast States coexisting with short-coast States in semi-enclosed seas. The Libyan argument for special advantage is after all not conditioned to apply only in the case of a single short-coast State opposite and the factor of territorial magnitude is, in Libya's thinking, equally significant for each kilometre of Libya's coast, irrespective of the number of short-coast States affected.

9. The coincidence of result between the proportionality criterion, as applied by Libya, and the principle of natural prolongation, is wholly artificial and would be so even if the so-called Rift Zone had the significance contended for by Libya in the context of its argument based upon natural prolongation.

The final conclusion may now be formulated. The premise to that conclusion
must be the geographical framework and the relevant area. The trapezium figure,
㊴⑬ which appears on Figures 7 and 26 in the Malta dossier illustrates, I submit, the
㊴ correct position and does so in the simplest possible terms. In Figure 7, the tra-
pezium shows the relevant area in relation to the position as between the actual
⑬ geography of Malta and Libya; in Figure 26 the trapezium is presented simply as
㊴ an analytical concept. The relevant area, as shown on Figure 7, consists of the
submarine areas lying between the coasts of the Parties. The attribution of an
equal seaward extension of jurisdiction from the relevant coasts is represented by
a median line.

The trapezium figure is based on the actual geographical relationships. It shows that the median line between Malta and Libya leaves Libya with a proportion in the ratio of five to one of the submarine areas dividing the Parties — that is Malta's proportion, that is what remains to Libya. And this proportion is, in fact, admitted in the Libyan pleadings. It is a proportion based on two factors, the first is the equality of seaward reach — and this gives *equal legal weight* to the coasts of both Parties, in so far as they are opposite each other.

The second factor consists of the longitudinal reach of the coasts of Libya. That is inevitably and directly reflected in the extent of the southern segment of the trapezium.

In this way the median line reflects the coastal configurations. The north-south, or facing, or opposite relation is treated on an equal basis, since to do otherwise is to create an inequity. The longitudinal aspect of the attribution is also determined neutrally, and therefore on a basis of equality, since it is the attitude of the coasts of the Parties and their relation to each other which produce the lateral limits of the areas delimited by the median line. By the attitude, we mean the areas which are facing either the coasts of Malta or the coasts of Libya and the concept of facing and the concept of attitude is reflected in the sides of the trapezium; and then we have the coasts of Malta and the coasts of Libya, opposite each other. Thus are the legally equal entitlements based upon geographical data which are different from each other, but are to be treated equally within the legal order. A long-coast State thus generates a larger area of shelf than a short-coast State without this involving any inequality in the opposite or seaward extensions of jurisdiction.

Mr. President, the 1973 proposal of Libya, which was based exclusively upon
⑤ the proportionality argument, and appears on Figure 1 of the dossier, would pro-
duce a situation in which Malta would be virtually deprived of all adjacent sub-
marine areas outside her territorial sea. This outcome can be compared with the
㊳⑬ result achieved in the trapezium figure (Figs. 7 and 26), which shows a delimita-
tion which produces no encroachment on shelf areas which are more adjacent to
Libya than to Malta. Indeed, the counterpart to the Libyan claim would be a line
along perhaps the Tripolitanian Furrow, and it was just such a line which was ruled
out by the Court in the *Tunisia/Libya* case (*I.C.J. Reports 1982*, p. 64, para. 80).
The existing experience of delimitation in semi-enclosed seas and gulfs — and
it is substantial — provides no support for the Libyan view on these matters.

Neither in principle nor in practice is there any justification for a weighting in favour of long-coast States which would destroy the legal equality of coastal States. Such a weighting would be *ex hypothesi* disproportionate, unreasonable and inequitable. Malta is relying upon the concept of legal equality in the matter of shelf delimitation and this involves the reflection in equitable terms of the relevant geography and geographical relationships. The median line represents the equitable result in this case, precisely because that line gives legal expression to the equality of seaward reach of the coasts abutting upon the relevant area. Malta's position does not involve a claim to a spatial half-share of the relevant area. As the Agent for Malta has already indicated in his exposé of the issues, the calculations of the Libyan Counter-Memorial — at **II**, page 43, footnote No. 4 — produce a result according to which, within the area covered by the trapezium, Libya would receive approximately five times as much as the area in issue as Malta. Malta's stance is based firmly upon a concept of equality within the pertinent legal order; and the trapezium illustrates that conception. Malta's conception of proportionality as a test of the equity of the result is compatible with the geographical and legal framework of the case. In contrast, the Libyan reference to the ratio of coastal lengths, like the reference to an index of territorial magnitude, is inappropriate both in terms of general legal principle and in terms of the geographical circumstances. Any doctrine which is allowed to subvert the fundamental legal equality of coastal States would produce radical and disruptive effects in the process of delimitation, whether this is to take the form of negotiation or the activity of international tribunals.

Mr. President, I have concluded my presentation. I would like to thank the Court for its customary courteous attention, and I ask you if you would recognize the Agent of Malta.

## STATEMENT BY MR. MIZZI

AGENT OF THE GOVERNMENT OF MALTA

Mr. MIZZI: Mr. President, Members of the Court. It had been our intention that my learned friend Mr. Lauterpacht would sum up the case for Malta and that I should conclude this round of the oral proceedings with a few words.

However, the statements by counsel have run a little longer than expected and, in order not to abuse the courtesy of the Court, we have agreed that I should instead conclude Malta's submissions at this stage of the oral proceedings by recalling, very concisely, the hard core of the arguments developed by my learned friends and colleagues during the previous sessions.

We believe that Libya's case rests fundamentally on two main propositions.

The first is that Malta's natural prolongation terminates at the so-called Rift Zone on the south, and at the Escarpments-Fault Zone on the east. Consequently, the delimitation of the shelf areas of Malta and Libya ought to be effected by means of a line which follows the general direction of the said Rift Zone and which is contained within it.

The second proposition is that such a line is also the line which is indicated by the requirements of equity which, in Libya's view, is synonymous with a division of shelf areas in direct proportion to the lengths of the respective coastlines and bearing also some relation to the difference in the size of the respective landmasses.

In answer to these arguments, counsel for Malta have shown, and I believe conclusively, that the Rift Zone does not produce a fundamental discontinuity in the natural prolongation of the Parties' territories, much less does it terminate Malta's continental shelf. Moreover, whatever its true physical nature may be, the Rift Zone is legally irrelevant since the continental shelf of Malta would extend, in law, up to the very shores of Libya were it not for the legal entitlement of Libya to the same shelf. There is, therefore, no valid reason why the delimitation should be effected by a line within the Rift Zone. The same applies, with perhaps greater force, to the Escarpments-Fault Zone.

As to the second Libyan proposition, counsel for Malta have shown that proportionality in the form of a ratio between the size of landmasses is not even recognized in international law, whether by the jurisprudence, State practice or doctrine. They have further shown that in cases of delimitation, proportionality is merely a criterion for assessing the equitable or inequitable effects, of a particular geographical feature or configuration upon a delimitation which would otherwise be indicated by the general configuration of the coastlines of the Parties. It is not an independent source of rights and only infrequently does it appear in the form of the ratio between areas of shelf and lengths of coastlines.

Proportionality therefore has no role to play where the geographical circumstances are normal and the delimitation indicated by those circumstances is consequently also equitable. Such are the circumstances of two opposite States, at some distance one from the other, without any feature or other circumstances which could disturb the regularity of the geographical setting, and these are precisely the circumstances of the present case.

Thus, in Malta's submission, both arguments which are fundamental to Libya's case have been shown to be unable to withstand a close scrutiny of their validity. Indeed, the manner in which Libya invokes natural prolongation and proportionality as a justification for constructing the boundary so close to Malta and so distant from its own shores not only lacks legal validity but is also an invitation to disproportionality.

On the other hand, Malta's case rests, it is firmly believed, on very solid factual and legal grounds.

It rests on equity as reflected in the uncontested principle governing all State relations in the contemporary international law; namely, the equality of States. That principle applies to both entitlement and delimitation. It entitles all States, large or small, continental or insular, to an equal standing both with respect to entitlement of continental shelf rights and to their delimitation when the rights of one State and those of a neighbouring State meet and overlap. Less effect has at times been given to island dependencies. But island States are States with equal rights to those of continental States and have invariably been treated as such.

In all such cases the equality of States demands that delimitation, which is the consequent and inevitable constraint on a State's rights, should be effected on an equal basis. Any discrimination on the grounds of size or insularity, or similar grounds, would violate the principle of equality as well as the principle of equity. In fact, neither of those principles could justify a rule which would give to a large State more than is justified by its coastal geography by taking away from a smaller State what properly belongs to it by reason of the seaward reach of its coasts.

In the case of opposite States, and Malta and Libya stand in that position, the shelf rights generated by their respective coastlines extend seawards one towards the other until those rights meet and overlap. That overlap has to be divided and the division can only be effected on the basis of equality and equitably by means of a line which leaves to both of them a relatively equal share of the areas of overlap. This result is obtained only by an equidistant or median line. This conclusion has been recognized by the jurisprudence and finds ample confirmation in State practice.

In special circumstances where such a line proves to be inequitable — such as where an otherwise equitable line is unduly distorted by some geographical feature — that line would have to be adjusted or modified and, in extreme cases, it may even have to give way to some other method or combination of methods. And even in such cases, the modification or adjustment is a modest one. But where this is not the case the equidistance line is the equitable and consequently the definitive line.

It is Malta's submission that this is precisely the situation in the present case. In the geographical setting of the case before the Court only a median line could allow Malta and Libya to retain an appropriate extent of the areas of shelf generated by the seaward reach of their respective coasts, and which ensures to both the least possible amputation of their respective entitlements. This does not mean that such a delimitation would result in an equal division of shelf areas in spatial terms. Those areas will be unequal in size, indeed, as has been shown, substantially unequal. But that is the natural and legally acceptable result of the different configuration of the coastlines of the two States including the difference in the length of those coastlines.

These differences, Malta respectfully submits, are adequately reflected in the result obtained from an equidistant or median line and such a line must therefore be also equitable. This is therefore the result — the equitable solution — which is the purpose and object of the whole case before the Court.

Mr. President, I have concluded. It remains only for me to explain that since there will be a second round of oral arguments which is due to start, as the Court has indicated to the Parties, towards the end of January or the beginning of

February, I shall not formulate the final submissions of Malta required by paragraph 2 of Article 60 of the Rules of Court at this stage. I shall do this at the conclusion of the last statement made by Malta during a further stage of the oral proceedings.

Mr. President, Members of the Court, with your permission I again thank the Court as well as our friendly and learned opponents for the courtesy and patience shown to us, and I extend to you, Mr. President, to the Members of the Court, to the Agent of Libya and to all counsel and other advisors on both sides, my Government's and my own good wishes for the coming festivities and the New Year to which we look forward with keen interest and anticipation.

*The Court rose at 3.55 p.m.*

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